No. 1497

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WILLARD N. JONES AND
THADDEUS S. POTTER,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR

Upon Writ of Error to the United States Circuit Court for the District of Oregon.

S. B. HUSTON and
M. L. PIPES,
Attorneys for Plaintiffs in Error.

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STATEMENT OF THE CASE.

On the second day of September, 1905, there was returned in the Circuit Court of the United States for the District of Oregon, an indictment against Willard N. Jones, Thaddeus S. Potter, Ira Wade, John Doe and Richard Roe, charging them with the violation of Sec. 5440 of the Revised Statutes

of the United States. Said indictment is as follows:

"IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

Of the April Term, in the Year of Our Lord Nineteen Hundred and Five.

UNITED STATES OF AMERICA,

v.

WILLARD N. JONES,
THADDEUS S. POTTER,
IRA WADE,
JOHN DOE, and
RICHARD ROE.

INDICTMENT: Violation of Section 5440, R. S., as amended by Act of May 17, 1879.

DISTRICT OF OREGON—SS.

The Grand Jurors of the United States of America, chosen, selected and sworn within and for the District of Oregon, in the name and by the authority of the United States of America, upon their oaths do find and present:

That Willard N. Jones, Thaddeus S. Potter and Ira Wade, each late of the State of Oregon, in the District aforesaid, and John Doe and Richard Roe, whose true names are to the Grand Jurors unknown, did, on the third day of September, in the year of our Lord nineteen hundred and two, at and in said State and District of Oregon, and within the jurisdiction of this Court, unlawfully conspire, combine, confederate and agree together, knowingly, wickedly and corruptly, to defraud the said United States out of the possession and use

and the title to those certain portions of its public lands situate, lying and being within the said State and District of Oregon, and then and there being of great value, which are hereinafter described, and which were open to homestead entry under the land laws of the said United States at the time the respective homestead filings hereinafter mentioned were made thereon at the local land office of the said United States at Oregon City, in said State and District of Oregon, to wit: the northeast quarter of the southeast quarter of section thirty-three and the north half of the southwest quarter and the southeast quarter of the southwest quarter of section thirty-four, in township eight south of range ten west (reference being had to the Willamette meridian and base line) upon which Daniel Clark made a homestead filing on the eighteenth day of June, nineteen hundred and two; and the northeast quarter of the southwest quarter and the north half of the southeast quarter of section thirty-two and the northwest quarter of the southwest quarter of section thirty-three, in township eight south of range ten west (reference being had to the Willamette meridian and base line) upon which George F. Merrill made a homestead filing on the eighteenth day of June, nineteen hundred and two; and the southwest quarter of the southwest quarter, the northwest quarter of the southeast quarter and the south half of the southeast quarter of section thirty-three, in township eight south of range ten west (reference being had to the Willamette meridian and base line) upon which Granvel C. Lawrence made a homestead filing on the eighteenth day of June, nineteen hundred and two; and the southwest quarter of section twenty-eight, in township

eight south of range ten west (reference being had to the Willamette meridian and base line) upon which James Landfair made a homestead filing on the eighteenth day of June, nineteen hundred and two; and the north half of the northwest quarter, the southeast quarter of the northwest quarter and the northeast quarter of the southwest quarter of section thirty-three, in township eight south of range ten west (reference being had to the Willamette meridian and base line) upon which Addison Longenecker made a homestead filing on the eighteenth day of June, nineteen hundred and two; and the southeast quarter of the southwest quarter, ter, the south half of the southeast quarter of section thirty-two, and the southwest quarter of the southwest quarter of section thirty-three, in township eight south of range ten west (reference being had to the Willamette meridian and base line) upon which Henry M. Riggs made a homestead filing on the eighteenth day of June, nineteen hundred and two; and the south half of the northeast quarter and the northwest quarter of the southeast quarter of section twenty-two, and the southwest quarter of the northwest quarter of section twenty-three, in township nine south of range ten west (reference being had to the Willamette meridian and base line) upon which Louis Paquet made a homestead filing on the third day of October, in the year nineteen hundred; and the north half of the southeast quarter and the southwest quarter of the southeast quarter of section fourteen, and the northwest quarter of the northeast quarter of section twenty-three, in township nine south of range ten west (reference being had to the Willamette meridian and base line) upon which William T. Everson made a homestead

filing on the second day of March, nineteen hundred and one; by means of false, illegal and fraudulent proofs of homestead entry and of settlements and improvements upon said lands respectively by said entrymen respectively, and by causing and procuring said respective entrymen to make false and fraudulent proofs of settlement and improvements upon said lands respectively, and thereby to induce the said United States to convey by patent said public lands to the said respective entrymen without any valid or sufficient consideration therefor, said defendants Willard N. Jones, Thaddeus S. Potter, Ira Wade, John Doe and Richard Roe then and there well knowing that each of said respective entrymen were not entitled thereto under the laws of the said United States by reason of the fact that they and each of them had utterly failed and neglected to ever actually settle or reside upon said land for any period or periods of time whatsoever and to faithfully and honestly endeavor to comply with the requirements of the homestead law as to settlement and residence upon or cultivation of the land so filed upon by each of them, and defendants Willard N. Jones, Thaddeus S. Potter, Ira Wade, John Doe and Richard Roe then and there well knowing that each of said respective entrymen was entering said land so filed upon by him for the purpose of speculation and not in good faith to obtain a home for himself:

And that in pursuance of said conspiracy and to effect the object thereof said defendants Willard N. Jones and Thaddeus S. Potter did cause, induce and procure said Daniel Clark, on the fifth day of September, nineteen hundred and two, to

make final proof before said Ira Wade, County Clerk of Lincoln County in said State of Oregon, a person entitled by law to take said proof, at the City of Toledo in said State and District of Oregon, and did then and there cause, induce and procure said Daniel Clark, in answer to the following questions, to make the following replies, to wit:

Ques. 3. Are you the identical person who made homestead entry No. 14233, at the Oregon City Land Office on the 18th day of June, 1902, and what is the true description of the land now claimed by you?

Ans. The NE ¼ SE ¼, Sec. 33, N ½ SW ¼ and SE ¼ SW ¼ Section 34, Twp. 8 S. R. 10 W.

Ques. 4. When was your house built on the land and when did you establish actual residence thereon? (Describe said house and other improvements which you have placed on the land, giving total value thereof.)

Ans. October, 1900. Established residence there at that time. House 14-16, orchard one acre and ½ acre in cultivation and fenced. Value, $450.00.

Ques. 5. Of whom does your family consist; and have you and your family resided continuously on the land since first establishing residence thereon? (If unmarried, state the fact.)

Ans. Myself and wife. Yes.

And to thereafter then and there sign and subscribe a statement entitled "Homestead Proof—Testimony of Claimant," known as form "4-369" of the General Land Office of the United States, containing said questions and answers, and to

swear to the truth thereof before said Ira Wade, a person then and there authorized under the laws of the United States to administer an oath in said case, and which said homestead proof so subscribed and sworn to by said Daniel Clark is in words and figures as follows, to wit:

(See transcript of record, page 20.)

The said defendants W. N. Jones, Thaddeus S. Potter and Ira Wade and each of them well knowing at the time said homestead proof was so subscribed and sworn to by said Daniel Clark that his answer to said question number five so then and there made by said Daniel Clark was false in this, that said Daniel Clark had never resided upon said land at all either with or without his family for any period or periods of time whatsoever.

And that in furtherance of said conspiracy and to effect the object thereof said Ira Wade did on the fifth day of September, nineteen hundred and two, subscribe and execute a certificate to the aforesaid homestead proof of said Daniel Clark, which is in words and figures as follows, to wit:

I HEREBY CERTIFY That the foregoing testimony was read to the claimant before being subscribed, and was sworn to before me this 5th day of September, 1902, at my office at Toledo, in Lincoln County, Oregon.

IRA WADE,
County Clerk.

And that in pursuance of said conspiracy and to effect the object thereof said defendants Willard N. Jones and Thaddeus S. Potter did cause, induce and procure said Addison Longenecker, on the fifth

day of September, nineteen hundred and two, to make final proof before said Ira Wade, County Clerk of Lincoln County in said State of Oregon, a person entitled by law to take said proof, at the City of Toledo in said State and District of Oregon, and did then and there cause, induce and procure said Addison Longenecker, in answer to the following questions, to make the following replies, to wit:

Ques. 3. Are you the identical person who made homestead entry No. 14239, at the Oregon City Land Office on the 18th day of June, 1902, and what is the true description of the land now caimed by you?

Ans. Yes: N ½ NW ¼, and SE ¼ NW ¼, and NE ¼ SW ¼ Section 33, Twp. 8 S. R. 10 W.

Ques. 4. When was your house built on the land and when did you establish actual residence therein? (Describe said house and other improvements which you have placed on the land, giving total value thereof.)

Ans. October, 1900. Established residence October, 1900. House 14-16. Orchard one and acres in cultivation and fenced. Value, $500.00.

Ques. 5. Of whom does your family consist; and have you and your family resided continuously on the land since first establishing residence thereon? (If unmarried, state the fact.)

Ans. Wife. Yes.

And to thereafter then and there sign and subscribe a statement entitled "Homestead Proof—Testimony of Claimant," known as form "4-369" of the General Land Office of the United States, containing said questions and answers, and to swear to

the truth thereof before said Ira Wade, a person then and there authorized under the laws of the United States to administer an oath in said case, and which said homestead proof so subscribed and sworn to by said Addison Longenecker is in words and figures as follows, to wit:

(See transcript of record, page 27.)

The said defendants W. N. Jones, Thaddeus S. Potter and Ira Wade and each of them well knowing at the time said homestead proof was so subscribed and sworn to by said Addison Longenecker that his answer to said question five so then and there made by said Addison Longenecker was false in this, that said Addison Longenecker had never resided upon said land at all either with or without his family for any period or periods of time whatsoever:

And that in furtherance of said conspiracy and to effect the object thereof said Ira Wade did on the fifth day of September, nineteen hundred and two, subscribe and execute a certificate to the aforesaid homestead proof of said Addison Longenecker, which is in words and figures as follows, to wit:

I HEREBY CERTIFY That the foregoing testimony was read to the claimant before being subscribed, and was sworn to before me this 5th day of September, 1902, at my office in Toledo, in Lincoln County, Oregon.

IRA WADE,
County Clerk.

And that in furtherance of said conspiracy and to effect the object thereof said defendant Willard

N. Jones did, on the fifth day of May, nineteen hundred and four, cause and procure the following letters and affidavit to be sent to the Honorable E. A. Hitchcock, Secretary of the Interior, by C. W. Fulton, who was then and there a duly qualified and acting Senator of the United States for the State of Oregon, to wit:

(See transcript of record, page 31.)

Against the peace and dignity of the United States and contrary to the statute in such case made and provided.

FRANCIS J. HENEY,
United States Attorney.
H. RUSSELL ALBEE,
Foreman U. S. Grand Jury.

Names of Witnesses:

JOHN L. WELLS.
THOMAS JOHNSON.
ANTHONY GANNON.
LOUISE WENDORF.
GEORGE J. WEST.
ADDISON LONGENECKER.
G. RILEA.
JOHN MEISEK.
LEE WADE.

A true bill.

H. RUSSELL ALBEE,
Foreman Grand Jury.

Filed September 2, 1905.

J. A. SLADEN,
Clerk U. S. Circuit Court, District of Oregon."

Motion to Quash Indictment.

A motion to quash the indictment was filed, supported by an affidavit (see page 50 of record), from which it appears that the names of the witnesses who testified before the Grand Jury were not endorsed upon the indictment. Whether or not this motion to quash should have been sustained, depends upon one question, namely: Is the practice in the Federal Court with relation to such matters governed by the laws of the State in which the Court is held? Section 1349, of Bellinger & Cotton's Code of Oregon, provides that the indictment must be set aside:

2. When the names of the witnesses examined before the Grand Jury are not inserted at the foot of the indictment or endorsed thereon.

This provision of the Code has been before the Supreme Court of Oregon several times.

State v. Pool, 20 Ore. 150.

State v. Smith, 29 Ore. 483.

State v. Andrews, 35 Ore. 388.

State v. Warren, 41 Ore. 348.

In all these cases the Supreme Court of Oregon held that the provision is mandatory and that the indictment must be set aside upon a failure to do so.

Does the local statute and practice govern?

In the case of the United States v. Mitchell, et al., 136 Fed. 896, a plea in abatement was filed by the defendant for various reasons. The Government claimed that since the local statute recognized

no such plea to an indictment, that therefore the Federal Court, sitting in Oregon, would not take cognizance of it. The matter was thoroughly argued, and Judge Bellinger, in ruling upon the matter, said:

"The rule by which the procedure in the Federal Courts relating to the organization of Grand Juries and objections to indictments is made to conform to the local law is too firmly established to admit of question at this late day. It has existed in this Court since its organization with the establishment of the State government, without objection until the present time." (Page 911.)

It would seem that the Government ought to be willing to be governed by this rule. It ought not to be allowed to blow hot and cold upon this question. Either the local statute and practice governs, or it does not. If it governs in one case, it does in another.

The Plea in Abatement.

The defendants filed a plea in abatement (see page 57 of the record) setting forth substantially the facts which were afterwards stipulated and are as follows (see page 63 of the record):

The Grand Jury which indicted the defendants was composed of twenty members. They were all present during the taking of the testimony against the defendants except one, F. W. Durbin. On Friday, September 1, 1905, all being present except Durbin, they all voted in favor of an indictment against the defendant Potter, and all but one as against the defendant Jones, but did not return

their indictment into Court at that time. They thereupon adjourned until Tuesday, the 5th day of September, 1905. After they had adjourned the United States Attorney and the Foreman caused a notice to be sent to them by mail, telegraph and telephone messages through the United States Marshal and his deputies, to meet again on Saturday, the 2nd day of September, 1905. Eighteen of them met on the 2nd, the said F. W. Durbin not being present and another one, Jackson A. Bilyeu, was not present because he was not notified. Durbin had been excused for an indefinite period by the Foreman and the United States Attorney on the 26th of August, and did not meet with the Grand Jury again until the 28th of September. On the 2nd of September, when eighteen of them met, they found this indictment and it was endorsed and returned into Court by the Foreman in the presence of the other seventeen.

Two or three questions might be raised upon this plea in abatement.

First. We know of no authority possessed by the Foreman of a Grand Jury or by the District Attorney to excuse a member of a Grand Jury. We think the Court could do it if sickness or some special reason was shown. Otherwise, we doubt its power to interfere with the organization of the Grand Jury. It is a very dangerous power, especially to be trusted to the hands of the Foreman or of the United States Attorney. If they have such power, they could indict whoever they desired to by getting rid of the non-pliable members, if there were such, by the process of excusing them. Mr. Durbin was not excused for the term and it

does not appear that there was any reason for his being excused, and if there was, it certainly ought to have been done by the Court, since no one else had the power to do so.

Second. The authorities are universal that the indictment must be returned into Court in the presence of the Grand Jury as a body.

Bishop's New Criminal Procedure, Vol. 1, Sec. 869.

State v. Bordeaux, 93 N. C. 560.

State v. Squire, 10 N. H. 558.

Third. But the ground which we wish to specially urge upon the Court is that the **Grand Jury was not in legal session** or organized on Saturday, the 2nd day of September, 1905. The only power which existed to determine the time and place of the sitting of the Grand Jury was the Grand Jury itself. It adjourned until Tuesday, September 5th. It was not reconvened by the Court and no one else had any authority to reconvene it. When certain members of the Grand Jury met again at a time previous to the date fixed for their meeting, they were simply individuals and nothing more. They had no more right to find an indictment under those circumstances than they would have had if they had accidentally met at a hotel or theater. Suppose the State Fair had been in session at the time of the adjournment and they had all, or a large number of them, say a quorum, gone to the State Fair, and while on the Fair grounds had found and returned this indictment. Would anyone contend that it was a valid indictment? A few years ago the Oregon Legislature adjourned on Friday night

until the following Monday. Ex-Senator H. W. Corbett gave them a dinner at the Portland Hotel on Saturday night and nearly all attended it, many more than sufficient to make a quorum. Suppose the presiding officers of the different houses had called them to order and they had proceeded to enact legislation while at the table at Mr. Corbett's dinner. Would anyone contend that the legislation was valid? Furthermore, neither Durbin or Bilyeu were notified or had an opportunity to be present. It may be said that if Bilyeu had been present he would have voted as he did the day before. Let it be conceded. That does not answer the question.

A special corporate meeting having to do with nothing more serious than questions of property, is utterly void unless every member has been notified. Mr. Thompson, in his work on Corporation, Sec. 706, says:

"The members of a corporation, public or private, can do no corporate act of a constituent character such as must be done at a general meeting of all the members or of a quorum of them, unless the meeting is duly assembled in conformity with the law of its organization. The same rule applies in respect of corporate business which is required to be done by the directors and which cannot be remitted to the mere ministerial agents of the corporation. So that the assent of a majority of the Directors at a meeting of the Board which has not been regularly called, as where notice of the meeting has not been given, will not be sufficient to give validity to an act as an act of the Board. It has been well said that an act of a majority of the

corporators does not bind the minority if it has not been expressed in the form pointed out by law, and accordingly that an act of a majority expressed elsewhere than at a meeting of the stockholders is not binding on the corporation, as where the assent of each one is given separately and at different times. The reason is that each member has the right of consultation with the others and that the minority have the right to be heard. In the line of authority establishing the foregoing principles, no break has been discovered, though it should be added that the election or other proceedings had at a meeting irregularly assembled may be valid if all attend and act or assent."

Sec. 707: "This leads to the conclusion that corporate meetings are invalid and that the business transacted thereat is voidable, unless the members have been duly notified of the meeting in accordance with the governing statute or by-laws, except in the case of stated meetings at which every member is bound to take notice."

Sec. 708: "Where a special meeting is called for the purpose of a corporate election, all the members entitled to vote at such meeting must be summoned or the election will be void. This point has been ruled again and again in the English King's Bench and it has been held that where a single member was not summoned by reason of his supposed absence and the consequent inability to summon him, the election was void."

Sec. 8486: "The general rule is that all the Directors of a corporation are entitled to notice of any meeting at which any corporate business is to

be transacted in order to make the action which takes place at any such meeting valid and binding."

Note 4: "It is almost needless to suggest that a minority of Directors cannot waive this right.

Citing Hill v. Rich Hill Coal Mining Co., 119 Mo. 9.

First National Bank v. Ashville Furniture, etc., 116 N. C. 827."

If it be true that the stockholders of a corporation or the Directors thereof can do no business at a special meeting without personal notice to every stockholder or Director, where it is only matters of property that are involved, can it be possible that a Grand Jury or a portion of it can fix a time to meet and give the minority to understand that they will meet at that time and then, without notice to a portion of its members, meet and find and return indictments involving the liberty and perhaps the life of a citizen? If this is the law, verily it "strains at a mouse and swallows a camel."

Demurrer to the Indictment.

It is, of course, elementary law that conspiracies are divided into two classes. First, conspiracies to accomplish a criminal or unlawful purpose. Second, a conspiracy to accomplish a purpose, not in itself criminal or unlawful, but by criminal or unlawful means.

The first class is easily defined, since it only includes those cases which some statute of the United States declares unlawful. Now, there is no statute making it an offense to defraud the United States out of its public lands. The conspiracy to do so is

a crime but the act of doing so is not a crime. That is to say, it is a crime to enter into a conspiracy to defraud the United States out of its lands, but the consummated act is not itself punishable as a substantive offense.

Nothing is a crime against the United States unless it is made such by statute.

Britton v. U. S., 108 U. S. 206.

U. S. v. Hudson, 11 U. S. (7 Cranch.) 32.

U. S. v. Coolidge, 14 U. S. (1 Wheat.) 415.

This offense then attempted to be charged in this indictment belongs to the second class of conspiracies.

The Means Must Be Set Out.

In the second class of conspiracies, the criminality consisting of the means employed; it follows as a natural sequence that the **indictment must set out the means,** so that the defendant will be apprised of the nature and cause of the accusation against him.

In Com. v. Hunt, 4 Metcalfe 111, Chief Justice Shaw said:

"And it follows, as another necessary legal consequence from the same principle, that the indictment must—by averring the unlawful purpose of the conspiracy, or the unlawful means by which it is contemplated and agreed to accomplish a lawful purpose, or a purpose not of itself criminally punishable—set out an offense complete in itself, without the aid of any averment of illegal acts done in pursuance of such an agreement; and that an illegal

combination, imperfectly and insufficiently set out in the indictment, will not be aided by averments of acts done in pursuance of it.

"From this view of the law respecting conspiracy, we think it an offense which especially demands the application of that wise and humane rule of the common law, that an indictment shall state, with as much certainty as the state of the case will admit, the facts which constitute the crime intended to be charged. This is required to enable the defendant to meet the charge and prepare for his defense, and, in case of acquittal or conviction, to show by the record the identity of the charge, so that he may not be indicted a second time for the same offense. It is also necessary, in order that a person charged by the Grand Jury for one offense may not substantially be convicted on his trial of another. This fundamental rule is confirmed by the Declaration of Rights, which declares that no subject shall be declared to answer for any crime or offense, until the same is fully and plainly, substantially and formally described to him.

"From these views of the rules of criminal pleading, it appears to us to follow, as a necessary legal conclusion, that when the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment; and if the criminality of the offense which is intended to be charged consists in the agreement to compass or promote some purpose, not of itself criminal or unlawful, by the use of fraud, force, falsehood, or other criminal or unlawful means, such intended

use of force, fraud, or falsehood, or other criminal or unlawful means, must be set out in the indictment. Such, we think, is, on the whole, the result of the English authorities, although they are not quite uniform. * * *

"Now, it is to be considered, that the preamble and introductory matter in the indictment—such as unlawfully and deceitfully designing and intending unjustly to extort great sums, etc.—is mere recital, and not traversable, and therefore cannot aid an imperfect averment of the facts constituting the description of the offense. The same may be said of the concluding matter which follows the averment, as to the great damage and oppression not only of their said masters, employing them in their said art, mystery, and occupation, etc. If the facts averred constitute the crime, these are properly stated as the legal inferences to be drawn from them. If they do not constitute the charge of such an offense, they cannot be aided by these alleged consequences."

The same doctrine is held in Com. v. Shedd, 7 Cush. 514.

In U. S. v. Cruikshank, 92 U. S. 542, it is said:

"In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In U. S. v. Mills, 7 Pet. 142, this was construed to mean, that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;' and in U. S. v. Cook, 17 Wall.

174, that 'Every ingredient of which the offence is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species; it must descend to particulars.' I. Arch. Cr. Pr. and Pl. 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, to inform the Court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances.

"It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This, because the accused must be advised of the essential particulars of the charge against him, and the Court must be able to decide whether the property taken was such as was the subject of larceny. So, too, it is in some States a crime for two or more persons to conspire to cheat and defraud another out of his property; but it has been held that an indictment for such an offense must contain allegations setting forth the means proposed to be used

to accomplish the purpose. This, because, to make such a purpose criminal, the conspiracy must be **to cheat and defraud in a mode made criminal by statute**; and as all cheating and defrauding has not been made criminal, it is necessary for the indictment to **state the means proposed,** in order that the Court may see that they are in fact illegal. State v. Parker, 43 N. H. 83; State v. Keach, 40 Vt. 118; Alderman v. People, 4 Mich. 414; State v. Roberts, 34 Me. 321. In Maine, it is an offense for two or more to conspire with the intent unlawfully and wickedly to commit any crime punishable by imprisonment in the state prison (State v. Roberts); but we think it will hardly be claimed that an indictment would be good under this statute, which charges the object of the conspiracy to have been "unlawfully and wickedly to commit each, every, all and singular the crimes punishable by imprisonment in the State prison." All crimes are not so punishable. Whether a particular crime be such an one or not, is a question of law. The accused has, therefore, the right to have a specification of the charge against him in this respect, in order that he may decide whether he should present his defense by motion to quash, demurrer or plea; and the Court, that it may determine whether the facts will sustain the indictment. So here, the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the Constitution, etc. All rights are not so granted or secured. Whether one is so or not **is a question of law, to be decided by the Court, not the prosecutor.** Therefore, the indictment should state the particulars, to inform the Court as well as the accused. It must be made

to appear—that is to say, appear from the indictment, without going further—that the acts charged, will, if proved, support a conviction for the offense alleged."

Mr. Justice Clifford, in his concurring opinion, uses the following language:

"Offenses created by statute, as well as offenses at common law, must be accurately and clearly described in an indictment; and, if the offense cannot be so described without expanding the allegations beyond the mere words of the statute, then it is clear that the allegations of the indictment must be expanded to that extent, as it is universally true that no indictment is sufficient which does not accurately and clearly allege all the ingredients of which the offense is composed, so as to bring the accused within the true intent and meaning of the statute defining the offense. Authorities of great weight, besides those referred to by me, in the dissenting opinion just read, may be found in support of that proposition. 2 East. P. C., 1124; Dord v. People, 9 Barb. 675; Ike v. State, 23 Miss. 525; State v. Eldridge, 7 Eng. (Ark.) 608.

Every offense consists of certain acts done or omitted under certain circumstances; and, in the indictment for the offense, it is not sufficient to charge the accused generally with having committed the offense, but all the circumstances constituting the offense must be specially set forth. Arch. Cr. Pl., 15th ed., 43."

In Pettibone v. U. S. 148 U. S. 197, it is said:

"The general rule in reference to an indictment is that all the material facts and circumstances em-

braced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be **made directly and not inferentially or by way of recital.** United States v. Hess, 124 U. S. 486 (31: 516). And in Britton v. United States, 108 U. S. 199 (27: 698), it was held, in an indictment for conspiracy under Section 5440 of the Revised Statutes, that the conspiracy must be sufficiently charged, and cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the object of conspiracy.

The Courts of the United States have no jurisdiction over offenses not made punishable by the Constitution, laws, or treaties of the United States, but they resort to the common law for the definition of terms by which offenses are designated.

A conspiracy is sufficiently described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means, and the rule is accepted, as laid down by Chief Justice Shaw in Com. v. Hunt, 4 Met. 111, that when the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment; while if the criminality of the offense consists in the agreement to accomplish a purpose **not in iself criminal or unlawful,** by criminal or unlawful means, **the means must be set out.**"

We have quoted quite freely from the Massa-

chusetts case and from these cases, for the purpose of showing that the Supreme Court of the United States has accepted and adopted the doctrine of the Massachusetts Court. A few of the inferior Courts have undertaken to set up a different rule, but they find no authority for doing so in the decisions of the Supreme Court of the United States. For instance, the case of United States v. Dennee, 3 Woods 50, Fed. Case No. 14948. This case holds the opposite doctrine. The opinion admits that the Massachusetts cases, the New Hampshire case and the Maine case, cited by the Supreme Court of the United States in the Cruikshank case, have held otherwise, but relies upon a few English cases and the case of People v. Richards, 1 Mich. 216, ignoring the fact that the doctrine of the Richards case had been overruled by the Supreme Court of Michigan in the case of Alderman v. People, 4 Mich. 414, also cited by the Supreme Court in the Cruikshank case.

But whatever may have been decided by these inferior Courts prior to the decision of the Supreme Court of the United States in the Cruikshank case and the Pettibone case, the question is no longer an open one and must be admitted to be closed by the decisions of our Supreme Court.

By the adoption of the Massachusetts doctrine, the Supreme Court has also settled that the statute which makes consiracy to defraud a crime, cannot serve the double purpose of making it a crime to defraud. This was what was attempted to be done in the case of Com. v. Shedd, 7 Cush. 514.

It is not an unlawful purpose to obtain a homestead. It is the unlawful means that constitutes the fraud.

In this case the pleader has recognized the rule that the means must be set out and has undertaken to set them out. The rule is well settled that even though it was not necessary to describe the means particularly, yet when the pleader undertakes to do it, he is bound by his description. Stripped of its verbiage and of its epithets, what does this indictment charge? It is this: That these defendants, with John Doe and Richard Roe, entered into a conspiracy on the 2nd day of September, 1902, to defraud the Government out of the use and possession of certain of its public lands, in the following manner: "By means of false proof of homestead entry and of settlements and improvements upon said lands, and by causing and procuring certain entrymen to make false proof of settlements and improvements." Certainly that is not sufficient. The defendant is entitled to be informed as to the particulars in which said proofs were false, but this indictment does not allege wherein or in what particular said proofs were false. It does allege that the defendants then and there (when?) well knowing that each of said respective entrymen were not entitled thereto, by reason of the fact that each of them had utterly failed to ever actually settle, etc., and then and there well knowing that each of said respective entrymen was entering said land so filed upon by him for the purpose of speculation and not in good faith to obtain a home for himself. It hardly needs citation of authority to show that an allegation that the defendants knew a thing to be false is not equivalent to an allegation that it was false.

This question was before the District Court of

the Southern District of California in the case of United States v. Peuschel, 116 Fed. 642. The case is on all fours with the case at bar and is instructive upon two propositions arising in this case. The indictment charged that the defendants had entered into a consiracy to defraud the United States out of the title and possession of certain lands. It attempted to charge that the lands were mineral lands and not subject to entry and that in pursuance of said conspiracy a certain affidavit was filed by one of the defendants asserting the non-mineral character of said lands, and then proceeded, "The said Edward A. Peuschel and said Frederick G. Maid and said others to the Grand Jurors unknown, then and there well knowing that said lands referred to in said affidavit and for which application to enter was made by said Frederick G. Maid were then and there mineral lands and not subject to entry and settlement under the homestead laws of the United States, and that there were then and there within the limits of said lands valuable mineral deposits." Judge Wellborn, in passing upon this, said:

"This allegation asserts expressly a mental condition of the defendants, but only indirectly and by way of inference the mineral quality of the land, and for that reason is insufficient under the authorities below cited.

United States v. Smith, 45 Fed. 561.

United States v. Harris, 68 Fed. 347.

United States v. Long, 68 Fed. 348."

This same question was before this Court in the case of Bartlett v. United States, 106 Fed. 884.

This was an indictment charging the accused with having committed perjury by falsely omitting from his schedule in bankruptcy certain of his property. The opinion is by Judge Gilbert, and this question is discussed as follows:

"The indictment in the present case does not directly charge that the accused had at the time of making his affidavit, property other than that which was described in his schedule. It alleges that he knew that his affidavit was not true and that he knew that he was the owner of the sum of $5,000 in addition to what was mentioned in his schedule. This is not an allegation that the accused owned $5,000 above what was mentioned in his schedule. It is contended that it is equivalent to such an allegation because it may be reasoned that he had the money from the allegation that he knew he had it. Or in other words, that he could not have known he had it unless he had it. The facts material to be charged in the indictment must be **stated clearly and explicitly** and must not be left to **intendment** or reached by way of **inference or argument.** The indictment in this instance states no ultimate fact in regard to the ownership of the $5,000, or even as to its existence. It states only a condition of the mind of the accused, knowledge that he is said to have possessed. This is not sufficient."

Citing Harrison v. State (Tex. Cr. App.), 53 S. W. 863.

Com. v. Still, 83 Ky. 275.

Com. v. Porter (Ky.), 32 S. W. 138.

Com. v. Weingartner (Ky.), 27 S. W. 815.

It may be urged that the indictment charges

that said entrymen had not settled or resided upon said lands by taking the entire allegation, as follows: "Said defendants Willard N. Jones, Thaddeus S. Potter, Ira Wade, John Doe and Richard Roe, then and there well knowing that each of said respective entrymen were not entitled thereto under the laws of the United States, by reason of the fact that they, and each of them, had utterly failed and neglected to ever actually settle or reside upon said land for any period or periods of time whatsoever and to faithfully and honestly endeavor to comply with the requirements of the homestead law as to settlement and residence upon or cultivation of the land so filed upon by each of them."

We submit that this is not an allegation that said entrymen had never settled or resided upon said land, but it is an explanation as to why the defendants knew that said entrymen were not entitled to the land. It says in substance that the defendants knew the entrymen were not entitled to the land because they had not settled on it. That is, of course, because the defendants knew they hadn't. The sentence is not open to any other construction, but if it were it would be insufficient because it would be undertaking to supply an essential element of the indictment by way of inference or recital. This cannot be done.

"No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication and the charge must be made directly and not inferentially or by way of recital."

U. S. v. Hess, 124 U. S. 483.

But this indictment is open to a still more serious objection in respect to this matter, for the reason that it is impossible to tell **when it was that these alleged facts did or did not exist** or this state of mind existed on the part of the defendants. The allegation is that the defendants entered into a conspiracy on the 3rd day of September, 1902, to defraud the United States out of certain lands, describing them. That Daniel Clark filed on a portion of them on June 18, 1902. That George F. Merrill filed on a portion of them on June 18, 1902. That Granville C. Lawrence filed on a portion of them on June 18, 1902. That James Landfair filed on a portion of them on June 18, 1902. That Addison Longenecker filed on a portion of them on June 18, 1902. That Henry M. Riggs filed on a portion of them on June 18, 1902. That Louis Paquet filed on a portion of them on October 3, 1900. That William T. Everson filed on a portion of them on March 2, 1901, and that the defendants **then and there** well knowing, etc.

Does this refer to the date of the formation of the conspiracy, or does it refer to the date when William T. Everson, the last one mentioned in the indictment, filed, or does it refer to some of the other dates mentioned in the indictment? It is impossible to determine and the **authorities are uniform that such an indictment is void.**

In Vol. 10, Enc. of Pleading and Practice, page 519, it is said:

"When time is once mentioned in any part of the information, it may be subsequently laid as the time of the commission of the offense by words of

reference as 'then and there,' with the same effect as if it were actually repeated; and likewise where the time is laid in one count it may be laid in subsequent counts by such words of reference, but such a reference is not sufficient where more than one time is laid in the part of the pleading referred to by the words, because it would not appear to which time such words applied."

Citing State v. Hays, 24 Mo. 360.

Jane v. State, 3 Mo. 61.

Com. v. Moore, 11 Cush. (Mass.) 602.

State v. Day, 74 Me. 220.

"Where the antecedent of 'then and there' is uncertain, as if more times or places than one are cited after which it is added that an act was 'then and there' done, the indictment will be insufficient."

Bishop's New Criminal Procedure, Vol 1, Sec. 414.

Citing U. S. v. Dow, Taney 34.

In United States v. Peuschel, 116 Fed. 648, Judge Wellborn said:

"Thus it will be seen that one element of the crime sought to be charged is that defendants knew said land to be valuable for its minerals and this knowledge must, of course, have been had at the time the conspiracy was formed. An allegation of such knowledge at any subsequent time, however brief the interval, for instance when the homestead application was filed or the affidavit sworn to, is insufficient. The clause in the indictment which most nearly fulfills the above mentioned requirement is the one last quoted, namely: 'The said

Edward A. Peuschel and said Frederick G. Maid * * * then and there well knowing * * * that there were then and there within the limits of said land valuable mineral deposits.' It is impossible to determine, however, from the words of reference used, whether the defendants had the knowledge imputed to them of the character of the lands at the time the conspiracy was formed or at the time said affidavit was sworn to or at the time said homestead application was filed, and **this is fatal to the indictment.''**

So in the case at bar, the defendants must have had the knowledge that the entrymen had not resided upon the land, etc., at the time of the formation of the conspiracy.

This is true, because it is not alleged in the indictment that there was any agreement between the defendants and the entrymen that the entrymen should not reside upon the lands. But suppose this was true, that they had not at that time resided upon the land a sufficient length of time or made the necessary improvements to entitle them to the homestead. They had an abundance of time in which to do this. The laws of the United States expressly give to the entrymen six months time after filing before they are required to make their entry upon the land. If they fail to make the entry within the six months, the Government does not cancel their filing for that reason, but it is subject to contest. Thousands of claims have been passed to patent where the entryman did not actually settle upon the land for a year after his filing, for the reason that the Government did not choose to interfere so long as there was no contest

on the part of a private individual. **So that the fact that they had not, at the time of the formation of the conspiracy, resided upon the land is utterly immaterial.**

We submit that this indictment is fatally defective:

1. Because it does not allege what proofs were agreed to be made.

2. It does not allege in what particular said proofs were to be false or were in fact false, or that they were in fact false.

3. If the Court could construe it to be sufficient in these respects, it is impossible to determine from the indictment when the facts which make the proofs false existed, or when the defendants had knowledge of the falsity.

Since the truth of the proof is not specifically negatived, as we have shown, the validity of the charge depends upon whether it is sufficient merely **to allege in general terms** that the proof was or was to be false. We contend that whenever the falsity of any instrument to be used as evidence, or of any evidence, is the basis of a criminal charge it is not sufficient to allege that it is false in general terms, **but the particular thing in which the falsity consists** and also the truth of the matter, must be alleged. There are two reasons for this rule; one is that the materiality of the matter may appear and the other is that the defendant may be informed of the nature of the accusation against him. If the proof was to be false in some immaterial matter there would be no criminal conspiracy. For instance, if the appli-

cant in answering the question as to the size of his family should say he had four children instead of three, it would not affect the validity of the proof; or to state a supposition more pertinent to this case, if he were to swear that he had resided on the land and improved it for **a less period than required by law to obtain a patent,** the matter would be immaterial because the Department could not issue a patent upon such proof. To do so would be in excess of the jurisdiction of the Department and beyond its powers. Congress has not conferred upon any Department the power to issue a patent to a homesteader upon proof of residence less than required by Act of Congress. The rule in perjury affords us a complete analogy. The proof of the homesteader is evidence to be used before the Department in order to secure a patent. If it is willfully false in a material matter the applicant is guilty of perjury. Every element, therefore, of the proof that would bring it within the law of conspiracy to defraud by means of false proof is the element that would bring it within the law of perjury.

In the case of the United States v. Shinn, 14 Fed. Rep. 447, the defendant was charged with perjury upon two assignments. It was a contest case under the Timber Culture Act, and the affidavit in the first assignment was that Reuben Kenny did not, within a year from the date of his entry break or plow five acres and did not do any plowing upon his claim during the first year. The truth of this was negatived by an allegation that Kenny did **some plowing.** The Court held this was immaterial because he was required under the Act to plow five

acres and the plowing of a less quantity was held to be immaterial. The second assignment was held bad, because the affidavit was to the effect that Kenny did not in the second year cultivate five acres by raising a crop; but this was negatived only by showing that he had plowed and harrowed ten acres. The Court held that this did not negative the truth of the affidavit because the law requires the cultivation of five acres to a crop.

In the case of the United States v. Howard, 37 Fed. Rep. 666, the Court made a similar ruling. This was a homestead claim and an application to commute the entry to a cash entry, and the affidavit which was made on July 3, 1887, was to the effect that the applicant had moved on the land in December, 1886; that his actual residence had been on the land up to taking the oath; **that his residence thereon had been continuous** and that he had not resided or boarded elsewhere than on said land since commencing his residence thereon. The Court held this allegation to be immaterial, because they were not statements required or authorized to be made in the affidavit of an applicant for confirmation of a homestead or "a homestead commutation entry," referring to Sections 2262, 2289 and 2291 of the Revised Statutes of the United States. Section 2291 requires proof of the residence for the term of five years, whereas the time between the moving on the land and the making of the affidavit was but a little more than six months.

That the truth of the matter in perjury must be specifically alleged is well settled.

2 Bishop's Criminal Procedure, Sec. 918.

2 Wharton's Criminal Law, Sec. 1300.

State v. Shupe, 85 Am. Dec. (and note) with authorities cited, page 498.

As we have shown there is no sufficient averment of **knowledge of the falsity** of this proof by the defendants. The case of Pettibone v. United States, 148 U. S. 197, is decisive that in such a case as this knowledge must be charged. In that case the purpose of the conspiracy was not to violate the injunction referred to, nor to obstruct the administration of justice, and therefore, the Court held that knowledge of the restraining order **could not be imputed to the defendants.** In this case, the purpose of the conspiracy is not to **promote or procure fraudulent entries** but only to **make false proof thereof.** Knowledge of the truth of the matter cannot be imputed to these defendants and must be specifically charged. If it be said that in this indictment the use of the word "knowingly" in the indictment is sufficient, there are two answers to that: The first is that the indictment does subsequently attempt to charge specifically the knowledge of the defendants; the same facts which we have shown to be insufficient. This specific charge must be supposed to be what was meant by the word "knowingly"; and under a familiar rule of construction, must qualify and limit the general term. That is to say, when it is said that the defendants conspired "knowingly" to defraud the United States by means of false proof and that the defendants knew at some indefinite time the entrymen were not entitled to patents and had not resided on the land, **it is that knowledge and not any other** that is included in the word "knowingly."

The other answer to the suggestion is made by this Court in the case of Salla v. United States, 104 Fed. Rep. 544. That was an indictment for conspiring "unlawfully, willfully, maliciously and **knowingly**" to destroy and obstruct the passage of a railway car and train which said "railway car and train was then and there carrying and transporting the mails of the United States." This Court, by Judge Gilbert, held the indictment fatally defective, because it did not charge expressly that the defendants knew that the said railway train was carrying the United States mail. The Court used this language: "The indictment charges conspiracy to commit an offense against the United States by conspiring together to unlawfully prevent, delay and obstruct a certain railway car and train which carries the mails of the United States. It does not charge that the conspiracy was for **the purpose to knowingly obstruct the mails**; if it had so charged the word **knowingly** might be said to have implied an imputation of knowledge that the United States mails were upon the train. The word "knowingly" as used in the indictment refers only to the action of the defendants in delaying the passage of a certain railway car and train. It is alleged that they willfully and knowingly obstructed the movement of the train. While it is true that the laws make the railways of the United States postal roads for carrying the mail, and a large number of passenger trains are engaged in carrying mail, it is nevertheless true that a great many passenger trains do not carry the mail. The defendants in this case are not charged with the overt act of obstrucing the passage of the mail or the carrier of the mail, but with conspiracy." And

so the Court held the indictment defective in this language: "The conspiracy as charged in the indictment lacks the essential ingredient of offense against the United States, to wit: that the defendants knew that the mails of the United States were carried upon the train which they conspired to obstruct."

Applying that case to the case at bar, we can say, that knowledge that the entrymen had not resided or did not intend to reside on the land **cannot be imputed to these defendants, because that was not within the purpose of the conspiracy.** At most the knowledge that is imputed to them by the word "knowingly" is a knowledge of the contents of the proof. Now the word "knowingly" may be sufficient to charge knowledge of the character of an instrument apparent upon its face; it may be held—it has been held—that the word "knowingly" sufficiently charges knowledge of the contents of an obscene letter deposited in the mails of the United States, but the obscenity is upon the face of the instrument. In the proofs, however, the falsity does not appear upon the face, but **arises from the nonexistence of facts aliunde—the proof.** The proofs themselves would seem valid and would be valid unless the entrymen had not completed their residence when the proof was made; knowledge of which by the defendants cannot be presumed since **they had nothing to do with the residence of the entrymen.**

There is another fault in this indictment upon which we greatly rely. **It does not charge any overt act done by any one of the conspirators.** For instance, Mr. Clark is charged to have made

false proof on the 5th day of September, 1902; but that proof cannot be the overt act, because Mr. Clark is not charged in the indictment to have been a member of the conspiracy. Since the statute requires that the act shall be done by one of the conspirators in furtherance of the conspiracy, it follows that the indictment must show that fact. The same observation can be made as to the other acts charged; none of them are charged to have been done by either of the present defendants. Ira M. Wade was charged to have taken the proofs, but he was acquitted by the jury, and therefore it is conclusively shown he was not a conspirator.

Now, what did Mr. Jones or Mr. Potter do in furtherance of this conspiracy to show that it was in active operation by them? The language of the indictment is that they "**caused, induced and procured** Daniel Clark" and the others to make false proofs, which are set out. But, to cause or induce or procure is **not the description of any act.** Admit the words mean that the defendants initiated a willful and wrongful effort to bring it to pass that Mr. Clark should make the false proof, we are still in the dark as to what that effort was; as to what act either of them did. Mr. Clark's proof, we may say, was the result of something that Mr. Jones or Mr. Potter did to influence him; we are entitled to know what that was. While the statute does not use the word "overt," the Courts without exception have defined the act as an overt act; that is to say it must be something palpable, tangible, capable of proof, and more than a mental act. It may consist of words spoken or written or other acts. We may imagine any number of things that

the defendants did whereby Mr. Clark was induced, caused and procured to make the proof: was it that he was asked to do it; that he was paid to do it; that the defendants agreed to buy the land from him when he should make the proof? The indictment answers none of these questions.

We are not aware that this precise question has been adjudicated in any conspiracy case, because the indictments usually allege an act done by one of the conspirators. We are assisted, however, in arriving at a conclusion here by an analogy which seems to be complete. In the charge of an attempt to commit a crime at common law and in most of the statutes an overt act is alleged and required to be proved, and the act must be specifically described and not in general terms.

Mr. Bishop says: "The conspiracy to commit a crime is in some degree in the nature of the solicitation, though it is more, and it is in part **within the rules which govern attempt.**"

1 Bishop on Criminal Law, 7 Ed., Sec. 767.

Also 2d Bishop Criminal Law, 2d Ed., Sec. 191,

where the learned author says, "We have already seen in a general way that **conspiracy is to a certain extent a species of attempt.**" Therefore, under Section 5440, we may say, that conspiracy and an overt act done in pursuance thereof, constitutes the attempt by more than one person acting in concert to commit a crime or a fraud upon the United States.

If it is necessary in the case of an attempt to

particularize the overt act in order to inform the defendant of what he is called upon to answer, for the same reason it is necessary to particularly characterize the overt act in the conspiracy in order that the defendant may be able to show, if he can, that the act was not done. In this indictment the defendants are informed that Mr. Clark and Mr. Longenecker made their proofs on the 5th day of September, 1902; but they are not informed **what they themselves are charged with doing in connection therewith.**

That in attempts the act must be described is stated to be the rule by Mr. Bishop. "The description of the act of attempt," he says, "it is but a repetition to state, must be specific and individualizing. The single word **attempt**—did attempt feloniously to steal—does not, as an allegation should, show to what class of attempts to steal the goods, or individual instance, belong, the nature or extent of what was done, or anything else specific to the particular accusation."

2 Bishop's New Criminal Procedure, Sec. 88.

See also Section 91, where the author criticises a contrary rule announced in Alabama.

"Indictments for attempts to commit a crime must aver the intent and the overt act constituting the attempt."

3 Ency. Pleading & Practice, 98, Note 3, Marginal Note 7,

where a number of causes are given illustrating the rule.

So, we say in conclusion on this point, that the

words "caused, induced and procured" constitute the only charge of anything done by the defendants in pursuance of the conspiracy, and that these words are not sufficiently definite to describe the act relied upon as the overt act.

Nor is the difficulty obviated by applying the principle that what one does by another he does by himself. That is true as a matter of evidence, but it is not true as a matter of pleading. When an **act is made criminal,** the charge must be direct and not inferential. It would not be good to charge a man with committing murder by charging him with causing another to commit murder, although if that were the fact he might be guilty as principal. Under the present statute, as we have seen, the act relied on as the overt act must be done by a conspirator, and the indictment does not charge that by charging not directly but indirectly **that he caused it to be done.**

We submit, therefore, that this indictment is bad for the reasons:

First. That there is no sufficient allegation of knowledge on the part of the defendants of the falsity of the proof.

Second. There is no sufficient allegation of an overt act on the part of either one of the conspirators.

Third. There is no sufficient allegation of any material matter in which the proofs were or were to be false.

The Statute of Limitations.

In this case the evidence showed clearly that the agreement or conspiracy, if there was one, **was formed in the year 1900.** The testimony was that Jones and Potter made arrangements with Wells to procure people to file upon this land and that Wells arranged for and procured the persons mentioned in the indictment, and others, who were willing to file upon this land upon the conditions named by the defendant Jones. The first step after that was to have the parties execute an agreement with Mr. Jones, which has been set out in the record, page 900, Government's Exhibit No. 26, and the testimony shows that every one of the entrymen mentioned in the indictment executed such an agreement before he went upon the land. That they then visited the land at different times and afterward filed upon it and finally made final proof.

Now, if there was a conspiracy on the part of the defendants to acquire these lands unlawfully, it must have been consummated before the signing of these contracts, and the signing of the contracts was an act in furtherance of the conspiracy. The visits to the land, the filing in the Land Office and all the steps taken by the parties for the purpose of making proof were overt acts and it is undisputed, in fact, it is affirmatively shown by the testimony of the prosecution, **that not one but many of these overt acts were committed prior to September 2, 1902. The indictment was found on September 2, 1905.**

The question of the statute of limitations was raised by objections to the testimony and by re-

quest for instructions, so that the question is squarely before this Court as to whether or not the statute of limitations against a conspiracy **begins to run from the commission of the first overt act** or rather whether an **overt act will toll the statute of limitations.** This question has been much discussed and variously decided.

At common law, no overt act was required to make a conspiracy indictable, and therefore the question does not seem to have arisen. We must look, therefore, to the statute under which this prosecution is conducted and to the decisions of the American Courts for light upon the subject.

As a matter of reason and logic, it seems to us that there is but one side to the question. The Supreme Court of the United States has settled the question so that it is no longer open to dispute that **the conspiracy is the crime** and that an **overt act is no part of the crime.** The statute of the United States, however, under which this prosecution is brought does not allow an indictment to be found until an overt act his been committed. As soon as this act has been committed in pursuance of the conspiracy, then of course the conspirator is liable to indictment and the statute begins to run. Does the commission of another overt act toll the statute or prevent it from running? It seems an absurdity to say that an act which is no part of the crime and which may in itself be perfectly innocent can prevent the running of the statute.

If the statute said "every person who shall enter into, pursue, be concerned in or knowingly take part in carrying out any conspiracy," etc.,

then there could be no question about it, but it does not so state. It makes the combination, the agreement, a crime. Suppose it said "Whoever shall enter into a written agreement," and certain persons should execute a written agreement in violation of the law and commit an overt act and then cease to do anything in pursuance of the agreement for a period of three years, would it be contended that they could be prosecuted if any one of the conspirators subsequently committed an overt act? Would the doing of an overt act constitute the crime of entering into a written contract? Nobody would so contend. Does it make any difference that the contract is oral? Certainly not. What would the doing of an overt act prove or indicate? That the parties had entered into another written agreement? Not at all. It would be evidence that they were attempting to carry out their original agreement and not **that they had made another.**

The first American case to discuss this question to which our attention has been called, is People v. Mather, 4 Wendell 229. In this case the defendant was acquitted and the People asked a new trial, for the reason that the Court had misconstrued the law. The Court had told the jury that a party who entered into and assisted in carrying out the object of the conspiracy after it had been formed and was under way, was not a conspirator. The Court held this to be wrong, and properly so, because whenever he entered into it he became a party to the agreement or conspiracy.

In discussing this question, the Court said that whenever they act, there they renewed, or perhaps to speak more correctly, they continued their agree-

ment and this agreement is renewed or continued as to all whenever any one of them does an act in furtherance of their common design. The Court will notice that this was not necessary to the decision of the question and was certainly put upon the wrong ground. The true theory is that when the defendant joined hands with the conspirators and aided them in carrying out their plans, he thereby adopted their agreement and became a party to it. This case was decided in 1830.

In 1877 the question came before the Supreme Court of Pennsylvania, Com. v. Bartilson, 85 Pa. St. 482. The first count of the indictment showed that the conspiracy had been formed more than two years before the finding of the bill, two years being the statute of limitations. Mr. Justice Paxson delivered the opinion. He said:

"It was strongly urged, however, that inasmuch as it was averred in said count that the defendants had in pursuance and renewal of said conspiracy, committed divers overt acts specifically described in said count, the date of one of which at least was within the statutory period, there was a continuance and renewal of the conspiracy from time to time and the statute was thereby tolled. This is plausible, but unsound. The offence charged was the conspiracy. According to all the authorities, the conspiring is the essence of the charge and if that be proved the defendants may be convicted. (Citing various authorities.) According to the first count, the offence was complete on the 20th day of December, 1874. The overt acts set forth do not constitute the offence. They are the evidence of it and are somtimes said to be the aggravation of

it. An overt act may and may not be unlawful per se. It is because of its relation to an unlawful combination that it becomes obnoxious to the criminal law. The averment that the conspiracy was renewed from time to time does not meet the difficulty. If it proves anything, it proves too much. The renewal of a conspiracy means to begin it again, to recommence it, to repeat it. From this it is apparent that each renewal is a new offence, a repetition, it is true, of a former one, but still an offence for which an indictment would lie. If, therefore, the overt acts were done or committed in renewal of the conspiracy of December 20, 1874, as charged in the count, they aver distinct offences. It is a well settled rule of criminal pleading that distinct offences cannot be joined in the same count. * * * The Commonwealth must allege and prove a conspiracy within two years. If this cannot be done, the Commonwealth has no case. The pleader evidently felt the strain of this part of his case when he introduced the averment that the overt acts were in renewal of the original conspiracy. It was practically laying an offence with a continuando. It was an attempt to prove the existence of the crime **within the statutory period** by showing its commission **outside of such period** and that it had been continued down to a time within it. In a recent case in which I delivered the judgment of the Court (Gise v. Com., 31 P. F. Smith 428), the doctrine was asserted that there is no such thing as a continuing offence, that it is wholly unknown to the criminal law."

The second count of the indictment charged an offence within the statutory period. A bill of

particulars was furnished the defendants showing the particular acts relied upon to establish the conspiracy. Most of those were outside of the statute. For this reason the lower Court quashed the second count, but Judge Paxson held this to be erroneous, not because the overt acts would toll the statute, but because they might be evidence from which a jury could infer the existence of a new conspiracy. He said:

"Acts and declarations of the parties prior to the statutory period may be given in evidence, provided they tend to show a conspiracy existing at the time charged in the indictment. It is true they would not be admissible for the purpose of proving a distinct crime barred by the statute, but where in conspiracy an overt act is done within two years and said act is but one of a series of acts committed by the parties, evidently in pursuance of a common design and to carry out a common purpose, such acts would be evidence, provided they tend to show that the last act was a part of the series and a result of an unlawful combination, and such evidence may satisfy a jury of the existence of a conspiracy at the later period."

This decision is cited on both sides of this question, but we think a careful reading of it sustains our contention.

Judge DeHaven, in the recent case of United States v. Brace, 149 Fed. 874, cites this case as favoring the contention of the defendants.

The question again arose in the case of United States v. Owen, 32 Fed. 534. The opinion of Judge Deady is very clear and distinct, and says:

"However, this is an instantaneous crime, composed of the conspiracy and the first act done to effect the object thereof, at whatever distance of time therefrom. When the conspiracy is formed the crime is begun, and when the act is committed it is consummated. An indictment will then lie against the criminal and the limitations on the right of the Government to prosecute him begins to run and in three years the bar is complete."

In 1888 this question arose in Illinois in the case of Ochs v. People, 124 Ill. 399 (16 N. E. 662). This was a case where the defendants were accused of conspiring to defraud the County. The evidence showed a very wide-spread conspiracy to rob the County by making up false and fraudulent bills, by corrupting the Commissioners, etc. It was a case which aroused public opinion greatly and was calculated to provoke a great deal of feeling. The defendants asked for an instruction that the conspiracy was completed when it was entered into and that the statute of limitations began to run at that time. The Supreme Court in passing upon this question, says:

"The first instruction as to all the defendants was faulty and misleading in telling the jury that the agreement or conspiracy was complete and the offence was then committed when the agreement or confederacy was entered into and that the period of limitation would commence to run from the time of committing the offence. The instruction was calculated to lead the jury erroneously to think that the period of limitation would commence to run from the time a defendant first became a member of the conspiracy, instead of from the time

of the commission of the last overt act in furtherance of the object of the conspiracy."

That is all. No attempt is made to show, either by reason or authority, that the Court was correct. It did not attempt to sustain itself in any way.

This question was raised again in the Federal Court in 1895 in the case of United States v. McCord, 72 Fed. 159. Judge Bunn said:

"I have no doubt that the statute of limitations has stood in the way of this prosecution from the first and that counsel for the Government have felt the difficulty. They admit that the indictment may properly have been found in March, 1891, that the conspiracy to defraud the Government was then formed by the defendants and various overt acts performed intended to effectuate its objects. If this be so, it is difficult to see why the statute did not then begin to run. Otherwise you would have a different period of limitation in conspiracies from what you have in other offences against the Government, which could not have been the intention of the law. The purpose evidently was to make a uniform rule applicable to all offences of the same grade. Counsel no doubt anticipated this difficulty and sought to avoid it by alleging an overt act committed on October 23, 1891, so as to avoid the claim of the running of the statute. Now, to make good this contention, it is claimed that the conspiracy is a continuing offence. No doubt a conspiracy is a continuing offence in this sense, that whenever an individual goes into a conspiracy, however late, he is considered as adopting all the previous acts of his co-conspirators and is liable in the same de-

gree with them. But that it is a continuing offence in the sense that as to the first and original conspirators this statute begins to run anew from the time of the commission of every overt act, is a contention that the Court is unable to affirm."

In 1897 the question arose in Mississippi, in the case of Insurance Company v. State, 75 Miss. 24. The question arose on a demurrer to the indictment and it is a little difficult to determine exactly which side of the question the opinion is on. It is cited by both sides. For example, in Ware v. United States, 154 Fed. 579, Judge Sanborn cites it as favoring the theory of the prosecution. In United States v. Brace, 149 Fed. 877, Judge DeHaven cites it as favoring the contention of the defendants. We think a careful reading of the opinion will show that what the Court means to say is the same as was intended by the case of Com. v. Bartilson, that if it is intended to prosecute the original conspiracy upon the theory that overt acts have been performed within the statute, that it cannot be done, but that the overt acts may be evidence from which a jury may find a new conspiracy. The Court says:

"If this indictment presented the original conspiracy as and when first formed, and that conspiracy was so originally formed more than two years before the finding of the indictment, the prosecution would of course be barred. Or if, treating this offence as composed of the original conspiracy plus the first overt act done in pursuance of it and as completed when such first overt act is done, then if such overt act was done more than two years before the finding of this indictment, in that case

also the prosecution would be barred. But the conspiracy presented by this indictment is a conspiracy formed in Lauderdale County within two years before the finding of this indictment, as manifested by overt acts committed within that time, such overt acts operating in law as a renewal when committed, of the original conspiracy. The question is thus resolved into ascertaining whether the pleader has averred such conspiracy thus renewed as a separate, new offence within the two years, and this the indictment does."

The Court distinguished their statute from Sec. 5440 of the United States, and says:

"Besides the difference between that statute and our statutes, the United States Supreme Court has expressly held that the offence denounced by Sec. 5440, United States Statutes, does not consist of both conspiracy and the acts done to effect the objects of the conspiracy, but of the conspiracy alone.

United States v. Britton, 108 U. S. 204.

Dealy v. United States, 152 U. S. 546.

These cases afford no help."

The opinion clearly indicates that in Mississippi the offence consists of the conspiracy and the overt act, whereas under Sec. 5440 the crime is the conspiracy alone, and that if the Mississippi Court was construing Sec. 5440 it would hold that the overt act not being part of the crime, would not operate to toll the statute of limitations.

The case of United States v. Greene, decided February 24, 1902, has been cited as sustaining the

contention that an overt act renews the conspiracy, but the case does not, in our judgment, so decide. The Court, in discussing the sixth count of the indictment, says:

"The count further charges that Carter, as such engineer officer in charge, would exercise the powers of his office fraudulently and corruptly in favor of the contractors in such contracts as might be so obtained by the alleged conspirators, etc. This is an additional and independent charge of conspiracy. **It does not depend upon the original scheme** set out in the first count of the indictment. It is in my judgment a valid count under Sec. 5440, Revised Statutes. It charges a conspiracy to defraud the United States in the several particulars mentioned in the other conspiracy count by the fraudulent exercise of those powers."

This question arose upon a demurrer to the indictment and the Court held that the pleading which charged a conspiracy and then in another count charged a later conspiracy for the purpose of applying and using the former one, was good as a matter of pleading and this is the extent of the decision.

This question next arose in ex parte Black, 147 Fed. 832, and the opinion is by Judge Quarles. He says:

"The indictment avers that the conspiracy was formed in September, 1902, to bring about the fraudulent entry of certain lands therein described. The filing of the necessary affidavits on the 7th and 8th of October, 1902, must have set the statute running, because it was an open act on the part

of the defendants to effect the purposes of the conspiracy. Therefore, according to the general precepts of the law, the action would be barred on the 8th day of October, 1905. The indictment in this case was found on the 3rd day of April, 1906. To escape this dilemma, the pleader has been driven to skillful fencing and adroit expedients. It is contended on the part of the Government that this was a so-called continuing crime. Conceding for the purposes of the argument that a conspiracy may under certain circumstances be recognized as a continuing crime, what fact or feature is there here to bring this case within such a classification? Here the conspiracy was confined to a single undertaking limited to particular descriptions of land and completed within six months. The entrymen were handled like a drilled squad and transported from place to place, taking the several necessary steps which culminated on the 17th of March, 1903. No effort was made to enlarge the original conspiracy, to embrace any other lands or adapt it to any further or different transaction. In the Greene-Gaynor case, United States v. Greene, 115 Fed. 349; Greene v. Henkle, 183 U. S. 251, the conspiracy was formed in 1891. From year to year the old conspiracy was adapted to new contracts whereby the Government was defrauded and in 1897 it was revived as to certain new Government contracts. There might be some reason for treating that as a continuing offence which was revived fresh with each new contract, but there is no well reasoned case to which my attention has been called which justifies the doctrine that in every case of conspiracy the statute begins to run from the last overt act instead of the first. In cases of that nature, the

doctrine of Com. v. Bartilson, 85 Pa. 482, and Insurance Co. v. State, 75 Miss. 24, is the more sane and reasonable. If the illicit scheme is continued and new overt acts to carry it out occur within the period of limitation, the pleader should charge a new conspiracy and a jury may be warranted from all the evidence in finding the existence of such new offence within that period. This appears to have been the course adopted in U. S. v. Greene, 115 Fed. 349. The indictment charged a conspiracy in 1891 and another in 1897, notwithstanding what is said in the opening about a continuing crime. Certain it is that on the 8th day of October, 1902, a definite overt act was performed, and on the 9th day of October, 1902, an indictment charging the conspiracy might have been found. Certainly the statute began to run at that date."

The next case in which the question arose is United States v. Bradford, 148 Fed. 413. The opinion is by Judge Parlange. The learned Judge criticizes the decision of the Supreme Court of the United States in United States v. Britton, 108 U. S. ——, which holds that the overt act is no part of the crime. He says:

"A criminal offence against the sovereign, which he cannot prosecute and punish, is, it seems to me, a matter which the legal mind cannot grasp. It is plain, then, that the statute of limitations is not set in motion by the forming of the conspiracy, but that the moment the conspiracy is formed, and an overt act is committed by one of the conspirators to effect the purpose of the conspiracy, that moment the offence can be prosecuted, and the statute of limitations begins to run as regards that con-

spiracy and that particular overt act. But I am absolutely unable to agree that if, after committing the first overt act, the conspirators do nothing more for three years, and they are not prosecuted within that time, they can thereafter continue the conspiracy, or renew it either publicly or secretly and as often as they please, and that they can commit as many acts as they choose to effect the object of the conspiracy, and yet have absolute immunity from prosecution for the conspiracy. * * * That immunity from prosecution for the conspiracy would result from the lapse of three years after the commission of the first overt act, although the conspiracy were thereafter continued or repeatedly renewed, and many other overt acts committed under it, is, to my mind, an utterly irrational conclusion, which the law could never have contemplated. * * * While the conspiracy per se might be the same, yet if the conspirators chose to renew it, or to continue it in existence, and to commit new overt acts to carry it out, the conditions under which the right of the Government to prosecute would arise, would be different every time a new overt act was committed."

Judge Parlange had the courage to follow his logic to its ultimate result, namely: That parties might enter into one single conspiracy, which is the crime as defined by the Supreme Court of the United States, and might be punished for a hundred crimes, although only guilty of one. He undertakes to defend this by reference to the case of O'Neal v. Vermont, 144 U. S. 331, in which the defendant was convicted of three hundred and seven different offences for selling liquor and sentenced to pay more than $6,000 in fines and 55

years in the penitentiary. But there is no similarity in the cases whatever. The difference is apparent to the merest tyro in the law. The statute under which O'Neal was prosecuted explicitly made each sale of liquor a separate offence, while the statute of the United States under consideration makes the conspiracy alone the offence. If it said each overt act should constitute a separate offence, then the comparison would be proper. That so learned a Judge should have been driven to defend his opinion and its results by such a comparison is conclusive evidence of its weakness.

If the theory of Judge Parlange is correct, that each separate overt act is a separate offence and may be indicted and punished, how is the defendant going to know when he is convicted after proof of a dozen overt acts, which one of the crimes he has been convicted of, and how is he going to plead his conviction or acquittal in bar of another prosecution? If they are all separate offences he is subjected to be convicted and punished for each one, and a prosecution for one would not bar a prosecution for another. But it would be impossible to tell of which offense the defendant has been convicted or acquitted and his constitutional right to be tried but once for any crime would become a thing of no value whatever.

The question next arose in the case of United States v. Brace, 149 Fed. 874. The opinion is by Judge DeHaven. The learned Judge admits that the Owen case, the McCord case, the Black case, the Bartilson case and the case of Insurance Co. v. State, sustain the view that the statute runs from the first overt act, and proceeds:

"The argument which is advanced to sustain this conclusion is very strongly stated by Deady, Justice, in United States v. Owen, 32 Fed. 534, and proceeds upon the theory that the conspiracy is not to be deemed a continuous crime while in process of execution, but is a completed offence the moment the first overt act is committed in pursuance thereof, as much so and in the same sense as the crime of murder or arson is completed and at an end when the deed is done. Of course, if this be so, the statute of limitations would commence to run at the date of the commission of said overt act. But it seems to me that the more reasonable view is that which was followed by the Supreme Court of Illinois in the case of Ochs v. People, 16 N. E. 662, and United States v. Greene, 146 Fed. 803, and that is to regard the conspiracy as a continuing offence so long as the parties thereto continue to perform acts to effect its object, and thus considered, the prosecution thereof is not barred if any overt act has been committed within the statutory period."

The Court will notice that the learned Judge does not undertake to reason the matter out, but simply says that it is his opinion this rule is more reasonable. He was not willing to follow his conclusion to its logical result as was Judge Parlange, because he adds:

"In saying this I do not mean to be understood as holding that when a number of acts have been committed in furtherance of one conspiracy there may be as many prosecutions therefor as there were acts. There can be but one prosecution based upon

a single conspiracy and this is not barred as to any overt act within the statutory period."

The next and last case in which this question arose is the recent case of Ware v. United States, decided July 10, 1907. The opinion in that case is by Judge Sanborn, with whom concurred Judge Hook. Judge Phillips dissented. Judge Sanborn says, after citing the authorities pro and con upon this question:

"After a careful reading and consideration of these and other authorities, our conclusions are that the true answer to this question is that the existence of a conspiracy and a conscious participation of the defendant therein within three years, are indispensible to the maintenance of such a prosecution; but that, if these facts are established by competent evidence, such a prosecution may be sustained. Proof of the formation by the defendant and others, more than three years before the indictment, of such a conspiracy as that charged in the indictment under which an overt act has been done prior to the three years, is insufficient to sustain the charge of a conspiracy within the three years. But in connection with evidence aliunde of the existence of the same conspiracy, and of the defendant's conscious participation therein within the three years, it is competent evidence for the consideration of the jury in determining the issue presented by the indictment. An overt act committed by one of the alleged conspirators within the three years pursuant to a conspiracy between him and the defendant, formed and followed by an overt act more than three years prior to the filing of the indictment without the defendant's consent or

agreement within the three years to the continued existence and to the execution of the conspiracy, is incompetent to establish its existence and his participation therein within the three years."

Judge Phillips dissented. After showing that it was well settled that the conspiracy is the crime and not the overt act, he says:

"The conspiracy shown by the Government to have been entered into between Ware and Lambert in October, 1902, made effective by an overt act, could no more form the basis of this prosecution than if Ware had been indicted therefor within three years thereafter and convicted or acquitted thereof. The statute of limitations was as effectual a bar as a plea of autrefois convict or autrefois acquit.

"No matter how many overt acts may have been committed by Lambert pursuant to that conspiracy, there was but one act for which the parties could be punished, and that was the consummated unlawful conspiracy. The action of the trial Court recognized this as the law, for while the plaintiff in error was found guilty on several counts, there was but one sentence imposed, as the conspiracy, and not the overt act, was the offence made punishable by the statute. Indeed, there was no occasion for more than one count in this indictment. After alleging the existence of the conspiracy, it was perfectly competent to proceed to set out in the same count all of the overt acts claimed to have been committed in furtherance thereof.

"The irrefutable logic of the law, it must therefore be conceded, is that, no matter how many overt

acts may be committed, if they are referable to one and the same conspiracy, they constitute not several conspiracies or evidence of as many conspiracies. The conspiracy on which the minds of the parties met was one and indivisible, and whenever it is consummated by the commission of one overt act, a statutory limitation, eo instanti, attached and creates a bar to the prosecution. The corollary of this postulate indisputably must be that, after the original conspiracy has been followed by any overt act, more than three years prior to the indictment, to support the prosecution under the statute there must be a wrongful agreement found and an overt act done in furtherance thereof within the three years.

"Names are of little consequence here. Whether we call it a new or renewed conspiracy, the essential requirement of the law, to give the statute of limitations the protective efficacy of its spirit, is that there must be a conspiracy between the parties charged formed within the statutory period of limitation.

"To constitute any agreement as the basis of a civil action or criminal prosecution, there must be the aggregatio mentium—the coming together of the minds of the parties in the formulation of its terms. It must be established by competent, substantial evidence, and not by conjecture, and in a criminal case like this it must be established to the satisfaction of the jury beyond a reasonable doubt.

"This brings us face to face with the crucial question in this case: The indictment charges a conspiracy formed within three years after the

alleged conspiracy of October, 1902, was barred by the statute of limitations, and it sets out the overt acts done in pursuance of the conspiracy. There is no allusion in the indictment whatever to the antecedent conspiracy agreement of October, 1902, and the first overt act done thereunder; nor is there any allegation that that agreement was continued to within the three-year period, by any wrongful agreement or any co-operation or participation of the parties in the overt acts. And yet, to support the indictment, the Government made proof of the antecedent agreement of 1902 to make out a case. And what is most remarkable in the trial of the case the Government made proof of the McKibben entries in furtherance of the original conspiracy, which confessedly occurred more than three years prior to the indictment. In respect of this the Court told the jury that this evidence 'was received solely for the purpose of throwing light upon the transactions mentioned in the indictment, so far as it might, in determining: First, whether or not there was a conspiracy such as charged, upon the part of any of the parties connected with said entry; and second, to determine the motive and intent of the parties in entering into such conspiracy or agreement.'

"No refinement or specious reasoning can obscure the fact that the jury were thus authorized to determine whether or not there existed the conspiracy charged in the indictment by having recourse to the McKibben entries. In other words, the jury were warranted in inferring the existence of the essential fact of a renewal of the antecedent conspiracy, barred by the statute of limitations, from the character and quality of an overt act done more

than three years prior to the conspiracy laid in the indictment; and the jury were further authorized, from such antecedent barred overt act, to determine the motive and intent of the parties in entering into such conspiracy or agreement. What conspiracy or agreement was meant?

"* * * If there was no new or different agreement from that under which the McKibben entries were made and that agreement was barred when the overt act evidenced by said entries was committed, then subsequent overt acts within the three-year period were clearly referable to, and were in pursuance of, the original agreement. So if the McKibben entries had occurred inside of the three-year period, then every subsequent overt act could have been laid in one and the same count as in furtherance of the agreement entered into in October, 1902.

"Thus we are confronted with the proposition of a continuing offence without any direct proof of the meeting of the minds of the parties in a new or renewal agreement, in order to toll the statute of limitations."

The difference between these two opinions runs through all of the cases on this subject. Every judge who holds that an overt act tolls the statute of limitations does so without any attempt to demonstrate it by reason or logic. Every judge who holds that it does not do so is able and willing to give the reasons "for the faith that is in him."

The case at bar was very similar to the Ware case. The indictment in this case charged that the conspiracy was entered into on September 2, 1902,

exactly three years prior to the finding of the indictment. There was no allegation in the indictment that there had been a former conspiracy which had been renewed and there was no attempt upon the trial to steer into the middle ground suggested by Judge Sanborn of permitting the jury to infer a new conspiracy.

The Government offered no proof of any conspiracy except one made in 1900 and then showed overt acts performed under it long before the three-year period prior to the filing of the indictment. It was not claimed or suggested that there had been any renewal, but the counsel for the Government boldly took the position that he proposed to show a conspiracy in the year 1900 and that it had continued to the time mentioned in the indictment.

On page 846 of the record, the witness Wells was asked the question by the Government: "And did you in 1900 have any talk with Potter and Jones in relation to securing soldiers' widows to file upon lands?" And the witness answered, "Yes." He was then asked to state what the conversation was and where it took place. Defendants objected upon the ground of the statute of limitations, and the Court said: "Is it to show any proof?" And Mr. Heney answered that he would connect the evidence and **propcsed to show that the agreement called for by the question was then and afterwards continued in existence down to the time of the finding of the indictment.**

And again, on page 848, upon objection to testimony with relation to this agreement as being a different conspiracy, Mr. Heney said to the Court

that the evidence was offered for the purpose of showing system and knowledge and proposed to connect the evidence and that it proposed to show that after filing for a few of the widows that they (meaning the defendants) took up the filing of the soldiers in the same connection, on the same general plan, and in the same place. So that this case cannot be determined or affirmed upon the doctrine of Judge Sanborn in the Ware case.

It presents the bald, naked question whether or not a conspiracy formed in 1900 and overt acts done thereunder at that time can be prosecuted by an indictment found September 2, 1905, because it is claimed **overt acts were done within the three-year period.** If the overt acts were the crime or a constituent element of the crime, then of course that would be so, but since it is settled by the Supreme Court of the United States that the conspiracy alone is the crime, there is no species of logic by which it can be reasoned out that an overt act tolls the statute of limitations. No Court or Judge has ever attempted to demonstrate it by logic and we think none ever will. It is impossible.

The only argument that any Court has ever attempted to use in sustaining that position is the argument ab inconvenienti. It is said if a conspiracy may be formed and overt acts done thereunder and the Government does not find it out, the parties may wait three years and then go on with their conspiracy and escape punishment. That is true, if the overt acts committed are not independent offences of themselves. If they are, they can be punished. But all statutes of limitation allow some criminals to escape. It is thought to

be better upon the whole that some should escape than that men should be prosecuted for offences committed long before, when the witnesses are perhaps scattered or dead.

But taking the argument of convenience, let us look at the other side of it. If the doctrine contended for by the prosecution is true, then A, B and C, when they are twenty years of age, may enter into a conspiracy and commit an overt act. The matter is then dropped and nothing is done for sixty years. One of them then commits an overt act in furtherance of the conspiracy. The other two defendants, who have lived perhaps blameless lives for sixty years, may be indicted and punished for their offence. Or it may be that they are innocent, but owing to the lapse of time and the death of witnesses they are unable to demonstrate their innocence and are convicted.

The argument of convenience has no place in a court of law, but if it is to be relied upon, we submit that from that standpoint the contention of the defendant is better.

The Means Must Be Such as Could Possibly Defraud.

This objection applies more particularly to the evidence introduced upon the trial than to the indictment, although we contend that the better rule is that the indictment should show that the means were adequate to defraud the Government.

In United States v. Reichart, 32 Fed. 142, the opinion was rendered by Mr. Justice Field of the Supreme Court of the United States. The charge

was a conspiracy to defraud the United States under Sections 5438 and 5440 of the Revised Statutes. The allegations were that they conspired to defraud the United States by making a false, fictitious and fraudulent claim upon the United States, knowing the same to be false, fictitious and fraudulent, which was to consist of a certain false, fictitious and fraudulent survey of certain public lands and making false field notes of the same, and which false, fictitious and fraudulent claim and the field notes thereof was designed and intended to be presented to the United States Surveyor General for California for his allowance and approval. Judge Field and the Circuit Judge sitting with him agreed that **the absence of any averment of authority in the Surveyor General to allow and approve the claim which was to be presented to him was of itself a fatal defect.** On re-hearing the Court adhered to its first opinion, and added that the indictment was also defective in not stating that the accused knew that the claim was false, fictitious and fraudulent. The only possible necessity for the allegation that the Surveyor General had authority to allow the claim would be to show that it was possible for the United States to be defrauded by the proposed scheme. In other words, if it was impossible to defraud the United States by the scheme or plan devised or means proposed to be used, then no crime is committed, no difference how reprehensible the conduct of the defendants might be.

The same question was before His Honor, Judge Dillon, in the case of United States v. Crafton, Fed. Case No. 14881 (4 Dillon 145). The charge was:

1. That the defendant Crafton was Adjutant General and Acting Paymaster of the State of Missouri. That his son was a clerk in his office; that other defendants were agents and attorneys for the collection of a claim and demand alleged to be due the members of a certain company of enrolled Missouri militia, growing out of their alleged service in the war for the suppression of the Rebellion. 2. That for the purpose of defrauding the United States out of the money alleged to be due for such services, the defendants conspired together to obtain the payment thereof out of the Treasury of the United States. 3. That to effect the object of such conspiracy, certain of the defendants made a false and fictitious muster and pay roll of said company and presented the same to the defendant John D. Crafton to audit, approve and allow the claim. 4. That to further effect the object of such conspiracy, said defendant, as Acting Paymaster, did audit, approve and allow the claim and issued certificates of indebtedness of the State of Missouri for the amount claimed to be due on said roll. 5. That further to effect the object of the conspiracy, the defendants transmitted this false and fictitious muster and pay roll to the Third Auditor of the Treasury of the United States. 6. That further to effect the object of the conspiracy, the defendants employed Craig and Strong to secure the passage of a bill which had been introduced into the Senate of the United States for the payment of said fraudulent claims. The opinion says:

"If, at the time the acts set forth in the indictment were done, the general Government had pro-

vided for the payment of such claims out of its own Treasury, undoubtedly those acts fraudulent in their nature and object would have been criminally punishable. It is just at this point that the case stated in the indictment is vulnerable. **Under the recognized rules of criminal pleading, it is not sufficient to allege generally a conspiracy to defraud, but the nature of the fraud and to the required extent the manner in which or the means by which it was to be effected must be offered.** United States v. Cruikshank, 92 U. S. 542-558. In the case at bar this has been attempted by the pleader but the difficulty is that it appears from the averments **the alleged conspiracy to defraud the United States was, under the existing legislation of Congress, legally impossible of execution.** * * * However fraudulent in ulterior design or morally reprehensible the acts charged in the indictment may be, still our judgment is that Sec. 5440 of the Revised Statutes cannot be extended to a case where the fraud which the conspiracy contemplated can only be effected in case an Act of Congress shall be thereafter passed of a nature to fit the prior conspiracy and give it something to feed upon. The demurrer to the indictment must be sustained."

Other cases might be cited, but we think none are needed. The proposition seems to us to be self evident. Suppose that the indictment or the proof showed that the defendants conspired to defraud the Government out of its lands by offering proof that they had never lived upon these lands at all; had never filed upon them, never settled upon them and had never made any improvements upon

them. Could it be contended that the defendants might be convicted? Certainly not, and the reason would be, of course, that it would be legally impossible for the United States to be defrauded by any such proof.

Suppose that the indictment charged that they conspired to defraud the United States out of its lands by causing a story to be published and circulated throughout the country, and persuading people to believe it, to the effect that the moon was made out of green cheese. Would such an indictment be good? The question needs no answer, and the reason is, of course, that it is not legally possible for the United States to be defrauded in that manner.

This question arose in the recent case of United States v. Burkett, 150 Fed. 209. In that case Byers W. Huey applied to make timber culture entry in 1890. He afterwards died and the defendants made some arrangements with his heirs to make bogus affidavits and proofs to get the land. The overt acts were committed in September, 1903. It was claimed by the defendants that as more than thirteen years had elapsed from the date of the entry to the formation of the conspiracy and the doing of the overt acts, that the entry was forfeited, inoperative and dead and could not be supported by the proofs made. In other words, that no proof could be permitted thirteen years after the date of the entry. The Government did not deny that this would be the result if it were true that the entry could not be perfected, but contended that it was possible for the entry to be perfected and therefore possible for the Government to be de-

frauded. In discussing this question, Judge Pollock said:

"If it be true, as contended by counsel for defendants, that the timber culture entry of Huey became dead and of no effect at the expiration of thirteen years from date of the entry under positive provisions of the law applicable thereto, then it is not shown by the indictment that any such entry was in existence at the time of making of the conspiracy or the obtaining and use of the false and spurious proofs in question. Therefore, as the entire object of the conspiracy, no matter how immoral and vicious it may have been, must as a matter of law fail of its purpose to defraud the Government out of its title to the land in question, it sounds to reason and good sense the charge made against defendants must fall of its own weight, as would the charge of forging a mere nudum pactum, and the demurrer must be sustained.

People v. Shall, 9 Cow. (N. Y.) 778."

The Court then proceeded to examine the law with reference to timber culture entries, and the decisions of the Land Office construing the statutes of the United States upon this subject held that notwithstanding thirteen years was the extreme limit of time allowed by the statute from the time of filing to the making of final proof, yet that under the rules of procedure in force in the Land Department, where no adverse claimant intervened and the claimant presented sufficient excuse for delay in submitting his final proofs, that the Land Office allowed such proofs to be made and the Court would follow such ruling, and therefore it was

legally possible for the Government to have been defrauded by the conspiracy, saying:

"It is enough if, under any circumstances, unless interrupted, the conspiracy might have accomplished its unlawful purpose."

Now, if we are correct in this, and the opinions of Judge Field and Judge Dillon, as well as reason and common sense, support these conclusions, what becomes of the case at bar?

The land out of which it was alleged the defendants conspired to defraud the Government is a part of the former Siletz Indian Reservation, and the manner of disposing of it is prescribed by the Act of August 15, 1894 (28 Statutes at Large, 326), which provides that when disposed of under the provisions of the homestead law, the final proof shall show three years **actual residence** on the land as a prerequisite to patent. So that no officer would have any authority to accept proof for a less period of time.

It was claimed upon the trial of this cause that this requirement of three years actual residence might be reduced upon proof that the claimants had served in the Civil War and a great deal of evidence was introduced over the objection of the defendants to the effect that the homestead claimants were soldiers in the Civil War. But this is not the law. The general law relating to homesteads provides for a five years residence and is subject to deductions for military service and other exceptions provided for by law, but the Act which threw this land open to settlement clearly intended to guard against anything of that kind, because it

contains the words "three years actual residence on the land," and this has been the uniform construction of this Act by the General Land Office.

In ex parte Clara M. Allison, the Secretary of the Interior, on October 15, 1902, said:

"The land in question is a portion of the former Siletz Indian Reservation and the manner of disposing of the same is prescribed by the Act of August 15, 1894 (28th Stat. 326), which provides that when disposed of under the provisions of the homestead law the final proof shall show three years actual residence on the land as a prerequisite to patent."

And held that in the absence of this proof the claim should be rejected. The claimant was a widow of a soldier who had served three years during the Civil War.

In ex parte Elizabeth Caplinger, widow of William Caplinger, deceased, the soldier had filed upon the homestead and resided there for a short period of time and then died. The husband had served as a soldier for a period of two years, eight months and twenty-two days in the Civil War, and the widow claimed the right to deduct that period from the three years period of residence required by law. On October 18, 1902, the Secretary, upon review of this claim, said:

"On February 3, 1902, your office rendered a decision denying said petition and holding that the military service of the entryman could not be accepted in lieu of residence in this class of cases, but holding also that cultivation of the land by the

widow or heirs for the required length of time would be considered equivalent to residence. The statute under which the lands in question were opened to settlement (28 Stat. 326) provides that where said lands are disposed of under the provisions of the homestead laws, the final proof shall show three years actual residence on the land. Under this statute, neither constructive residence upon nor cultivation of the land can be accepted in lieu of the actual residence expressly required by the statute. * * * Your said decision, in so far as it helds that the military service of claimant's husband can not be accepted in lieu of the actual residence required by the statute, is correct and is confirmed; but in so far as it holds that cultivation of the land by the widow can be accepted and construed equivalent to such residence, is erroneous and is reversed."

The same rule of decision has been consistently adhered to by the Land Office. These decisions will be found in Letter Book 471-D, pages 273 and 298.

Let us examine the proofs offered in this case with this in view.

The proof of Addison Longenecker, Govt. Ex. 40, page 340, shows that he established his residence upon said land in October, 1900, filed on the same on June 18, 1902, and his final proof was made on September 5, 1902.

The proof of George F. Merrill, Govt. Ex. 43, page 345, shows that he established his residence upon the land in October, 1900; filed June 18, 1902; final proof made September 5, 1902.

The proof of Granville C. Lawrence, Govt. Ex. 102, page 431, shows that he established residence October, 1900, filed June 18, 1902, and final proof was made September 2, 1902.

The proof of James Landfair, Govt. Ex. 127, page 473, shows that he established residence in October, 1900, filed June 18, 1902, and made final proof September 2, 1902.

The proof of Louis Paquet, Govt. Ex. 142, page 499, shows that he settled on the land on November 15, 1900, and it appears from the indictment that he filed on the same on the 3rd day of October, 1900.

The proof of Daniel Clark, Govt. Ex. 243, page 647, shows that he settled upon the land in October, 1900. Filed upon the same June 18, 1902, and final proof was made September 5, 1902.

The proof of Henry M. Riggs, Govt. Ex. 267, page 677, shows that he settled upon his land in September, 1900, filed upon the same on June 18, 1902, and final proof made September 2, 1902.

The proof of William T. Everson, Govt. Ex. 344, page 792, shows that he settled upon said land in October or November, 1900, that he filed upon the same March 2, 1901, and final proof made September 2, 1902.

So it appears that not one of these entrymen proved or attemted to prove that he had resided upon the land for the period required by law and that **there was no possibility of the Government being defrauded by reason of these proofs.** There is no allegation in the indictment and no attempt

made by the evidence to show that there was any conspiracy to persuade the officers of the United States Land Office that these proofs were sufficient. But even if there was, it would not be sufficient, under the doctrine as laid down by Judge Field in the Reichart case and by Judge Dillon in the Walsh case. These proofs were all immaterial and should not have been admitted in evidence, and after having been admitted in evidence are insufficient to support a conviction.

Evidence of Similar Acts.

The indictment in this case charges the defendants with conspiring to defraud the Government out of the claims taken as homesteads by eight different entrymen, but on the trial the Government was allowed to prove, over the objection of the defendants, that a large number of other persons had taken homestead claims under some arrangement with the defendants, namely: John L. Wells, William Teghtmeier, George West, George Rilea, Anthony Gannon, Franklin Hummel, Edward C. Brigham, Henry Marble, Menzo J. Morse, Thomas Johnson, and others, and the final proofs made by them were offered and admitterd in evidence over the objection of the defendants that they were incompetent, irrelevant and immaterial and referred to land and entrymen not described in the indictment and to a transaction not included in the conspiracy charged.

For example, on page 886, witness John L. Wells identified Government's Exhibits 8, 9, 10, 11 and 12, which are the final proof papers of the said John L. Wells. The defendants' counsel then

and there objected on the ground that the same were incompetent, irrelevant and immaterial and referred to land and to an entryman not described in the indictment and relating to a transaction not included in the conspiracy charged and final proof of a homestead claim which was made more than three years prior to the finding and return of the indictment in this case.

The objection was overruled and the exhibits were admitted in evidence. The Court did not limit their admissibility to any particular purpose. With this in view, the defendants' counsel asked the Court, in writing, to instruct the jury as follows: (Page 1040.)

"The defendants in this case are charged with a conspiracy to defraud the United States out of certain of its public lands, the claims filed upon by Daniel Clark, George F. Merrill, Granville C. Lawrence, James Lampheir, Addison Longenecker, Henry M. Riggs, Louis Paquet and William T. Everson, and if you find the defendants, or any of them, guilty of this charge, it must be with reference to one or more of these claims. Certain testimony has been introduced by the Government with reference to certain other land filed upon by other persons than those mentioned in the indictment and heretofore referred to. You cannot find the defendants, or any of them, guilty of the charge in this indictment upon the said evidence of a conspiracy to defraud the United States out of the lands not described in the indictment."

The Court refused to give this instruction, to which ruling the defendants were allowed an exception.

There can be no question that the defendants were entitled to this instruction. The evidence as to other transactions could only be admitted for the purpose of showing intent and design.

Josephi v. Furnish, 27 Ore. 266.

Trapnell v. Conklyn, 37 W. Va. 242.

Winchester Mfg. Co. v. Creary, 116 U. S. 166.

Turner v. Hardin, 80 Ia. 691.

The only question could be as to whether or not the failure to give this instruction was cured by the Court in its general instructions. Upon this subject the Court instructed as follows: (Page 1072.)

"As I have had occasion to advise you during the course of the trial, however culpable you may believe the defendants or any of them, have been with reference to any point testified to and included in this indictment, or however well established you may deem the criminality of any one of them in connection with any offence other than the one charged, you cannot find the defendants, or any one of them, guilty unless you find beyond a reasonable doubt that they have committed the crime of conspiracy as defined in these instructions and as charged in the indictment. The examination into such collateral facts was allowed as tending to establish guilty intent, purpose, design or knowledge and should be so considered in said relation to the charge under which the defendants are tried."

This instruction does not cover the point at all. Boiled down, it says to the jury: "You cannot convict the defendants, or any of them, of any other

acts than those charged in the indictment. The examination of the evidence of these outside matters tends to establish guilty intent, purpose, design or knowledge, and you should consider it for that purpose." It entirely fails to say, as it should have done, **that they must not consider it for any other purpose.** It permitted the jury to consider it not only for the purpose of showing guilty intent and purpose, but for the purpose of determining the guilt of the defendants upon the main charge for which they were being tried.

The rule which allows evidence of other crimes to be admitted for the purpose of showing intent is a harsh rule at best, but is allowed by the Courts, notwithstanding the undue prejudice which it tends to excite against the defendant. But we think the Courts agree that it should be carefully limited and the jury carefully instructed as to the purpose for which it was admitted.

Josephi v. Furnish, 27 Ore. 266.

Winchester Mfg. Co. v. Creary, 116 U. S. 166.

State v. Lewis, 19 Ore. 481.

Turner v. Hardin, 80 Iowa 691.

Admission of Ex Parte Affidavits Against the Defendants.

During the examination of John L. Wells, as a witness for the Government, and on his re-direct examination, page 900 of the record, he testified that he had given a statement to Mr. Neuhausen, a special agent of the Government, in relation to his connection with the matters upon which he had testified, and thereupon the defendants' counsel, to

whom was handed the written statement by Mr. Heney, cross-examined him as follows:

"I call your attention to this statement in what you said to Mr. Neuhausen: 'According to my recollection it was about July, 1900, when Thaddeus S. Potter, who was at that time occupying an office with W. N. Jones in the Worcester Building in Portland, Oregon, came to me in my office at 100 Grand avenue, Portland, and stated that W. N. Jones had a land proposition concerning which he required to interview me.' Is that correct?"

And the witness answered that it was about correct.

Defendants' counsel further read from the statement as follows:

"He stated the proposition in brief to me, namely, that the aforesaid Jones proposed to advance certain money to a number of soldiers' widows who should file and prove up on homestead claims within the limits of the Siletz Indian Reservation. Mr. Potter further explained that Mr. Jones proposed to give me $5 commission for each soldier's widow. At the conclusion of his remarks Mr. Potter stated that Mr. Jones wished to see me in his office." And the defendants' counsel asked the witness if that was correct and the witness answered, "This is about correct. Yes, sir."

And the defendants' counsel, further reading from said statement as follows:

"Either on the same date on which Thaddeus S. Potter interviewed me or a day after, I called on Jones at his office in the Worcester Building, Port-

land, Oregon, and he stated the proposition to me very much the same manner as Mr. Potter had explained it to me, but he, of course, elaborated the details more carefully," and the defendants' counsel asked the witness if that was correct, and the witness answered "Yes." And thereupon the United States Attorney offered the whole of the said statement made to Mr. Neuhausen in evidence as a statement of the whole conversation had by the witness with Mr. Neuhausen. In response to questions by the Court, the defendants' counsel stated that his purpose in reading the statement to the witness which appears above, was to affect the credibility of the witness, and thereupon the defendants' counsel objected to the offer of the said paper upon the ground that it was incompetent, irrelevant and immaterial, but the Court overruled the objection, and stated that it was admissible on the right of the witness to explain a conversation orally or on paper pertaining to the subject, and admitted the paper in evidence, which is marked Government's Exhibit 25, and was read to the jury as follows: (See Record Page 150.)

"John L. Wells, a citizen of the United States, residing at No. 600 East Ankeny Street, Portland, Oregon, being first duly sworn, hereby on oath deposes:

"I am fifty-eight years of age and a veteran soldier occupying at present the position of Adjutant of Sumner Post, G. A. R., at Portland, Oregon. I served as a private in the Sixth Regiment of West Virginia Volunteers from August 5, 1864, until June 10, 1865, and was discharged at Wheeling, West Virginia. I have resided on the East Side

at Portland ever since I have been in the State of Oregon, a period of about eighteen years, and during all of that time I have served in the capacity of a Notary Public.

"In my double capacity of Notary and member of the G. A. R. I have come in contact with a great many veteran soldiers and veteran soldiers' widows here in Portland, and have had charge of a considerable number of pension matters, etc., for them.

"I have known W. N. Jones, of No. 328 Chamber of Commerce Building, for a period of about ten years or more and had business relations with him for a considerable time before I ever engaged in any land transaction with him. The business relations consisted principally of arranging as fire insurance agent for insuring certain property belonging to him against fire (his residence).

"The first land deal in which I became engaged with the aforesaid Jones was what is known as the location of homestead entries on the former Siletz Indian Reservation. According to my present recollection, it was about July, 1900, when Thad S. Potter, who was at that time occupying an office with W. N. Jones, in the Worcester Building, Portland, Oregon, came to me in my office at 100 Grand Avenue, Portland, and stated to me that W. N. Jones had a land proposition concerning which he desired to interview me; he stated the proposition in brief to me, namely, that the aforesaid Jones proposed to advance certain sums of money to a number of veteran soldiers' widows who should file and prove up on homestead claims within the limits of the former Siletz Indian Reservation under a special act of Congress which had been passed per-

mitting final proof to be made on homestead entries within that territory after a residence of three years. Mr. Potter further explained that Mr. Jones proposed to give me $5.00 commission for each soldiers' widow who should, through my efforts, make a filing upon such homestead. At the conclusion of his remarks, Mr. Potter stated that Mr. Jones wished to see me in his office. Either on the same day on which Thad S. Potter interviewed me, or a day or two thereafter, I called on the aforesaid W. N. Jones, at his office in the Worcester Building, Portland, Oregon. He stated the proposition to me very much in the same manner in which Mr. Potter had explained it to me, but of course, Mr. Jones elaborated the details more carefully. He called my attention to a certain decision in a volume of Copp's Land Laws, said decision appearing to make it unnecessary for soldiers' widows (that is widows of veterans that had served in the Civil War in the Union Army) to reside on any homestead claims which they might take up as such soldiers' widows. Mr. Jones further stated to me that he desired to secure a number of veteran soldiers' widows to file on homestead claims and prove up on the same in accordance with certain conditions which he outlined to me, and he arranged with me that I should receive $5.00 for each soldier's widow that I should induce to file on a homestead claim. The conditions in question were that Mr. Jones was to advance all the expense money to cover the filing fees, cost of trips to and from the Land Office, the final proof payments and other incidental expenses necessary to relieve the veteran soldiers' widows from any expense whatever in connection with said entries.

The idea was that the total expense in each case was to consist of $150 as location fee, $250 to cover the costs of cultivation of the claim, $40 to cover the cost of Land Office fees, filing fees, etc., and $200 extra, making a sum total of $640.00, which total amount was to be secured by a mortgage covering the individual homestead claims.

Under the terms before mentioned, I talked with certain veteran soldiers' widows, among others being Amelia Mullen, Elizabeth Mayer, Louise C. Wendorf, Esther P. Collins, Mary E. Bushong, and possibly Martha Miller, explaining to each of them the proposition and telling them that they would not have to reside on the land, and stating to them that W. N. Jones was the man who was putting up the money for this transaction. I directed each of the women to come to Jones' office and there confer with him further in regard to the matter. I gave each of them his card for that purpose, said supply of cards having been given to me by Mr. Jones for that purpose. The terms outlined above were subsequently, prior to any filing, incorporated in the form of a typewritten agreement prepared by or through W. N. Jones, and a copy of this typewritten agreement is attached to this affidavit. I would like to have it understood that this agreement is the one that was signed by veteran soldiers' widows, and not by veteran soldiers, as the agreement which I will later refer to as having been signed by the veteran soldiers differed in some respects from the one entered into by the soldiers' widows. It is my belief that a number of the veteran soldiers' widows signed the agreement (copy of which is attached to this affidavit) in the office or in the presence of Mr.

Jones. My present recollection is that one or more of these widows signed similar contracts or agreements before me. The only name, however, that I can particularly designate at this time being that of Mary E. Bushong.

As a matter of fact none of the veteran soldiers' widows who filed on homestead claims under this agreement have visited the tracts of land comprised in their respective claims. Several of the widows made final proof on their claims, and my understanding is that W. N. Jones eventually got those claims deeded to him. I do not know who were the witnesses for the women at final proof. I am quite sure the proofs in these cases were made at Oregon City, Oregon. Three or four weeks after I secured the before-mentioned soldiers' widows to file on homestead claims under the agreement with W. N. Jones, before specified, it developed that there was not enough widows to go around; in other words, there were more tracts of land than there were widows that were available as entrywomen. Mr. Jones thereupon told me to get veteran soldiers who had served at least two years in the Union Army, his idea being that veterans with such service could deduct the two years time from the three years specified by the Siletz Reservation Homestead Act as the necessary period of residence of claims within that territory. Mr. Jones either drew up or had drawn up a new form of contract similar in its main features to the one which had been signed by veterans' widows and differing from the same mainly in so far as the total amount made payable to Jones for the entire cost of obtaining the claims was designated as $520 (in place of $440, as in the case of the soldiers' widows) and the mortgage to be given by

the veteran soldiers was in the sum of $720 and formed an incumbrance on each homestead claim. My arrangement with Jones in regard to my remuneration for obtaining veteran soldiers to file in accordance with his said terms was the same as in the case of the soldiers' widows, namely, I was to receive $5.00 for each veteran soldier who should, through my influence, be induced to file upon a homestead claim within the confines of the former Siletz Indian Reservation. Among the veterans who filed at my solicitation were Anthony Gannon, Joseph Gillis, Thomas Johnson, George Rilea, Oliver I. Conner, Franklin Hummel, Edward Brigham, George F. Merrill, Granville C. Lawrence, Henry M. Riggs, James Landfair, William Tightmeier, Addison Longenecker, and Daniel Clark. A great many of the parties named signed contracts of the nature before explained before me either in my office or in their homes or on the street or wherever I could strike them.

I filed on one of these homestead claims myself, and sometime after I made final proof, I signed a warranty deed in blank and turned same over to W. N. Jones, for a consideration of $200 which I received at his office in the form of a check which I cashed at the East Side Bank, Portland, Oregon, according to my best recollection. I have today learned for the first time that when the said warranty deed was filled out W. N. Jones was not named as the grantee and that another party's name was put in the deed and recorded as that of the grantee. Several of the veterans mentioned have to my own personal knowledge made similar transfers of their claims to Jones and in one or two instances transfers have been made to R. B. Mon-

tague, of Albany, Oregon. Each of the veterans before enumerated gave a mortgage to W. N. Jones, in the sum of $720, with his individual homestead as security, shortly after making final proof. I acted as witness at Oregon City, before the U. S. Land Office, in three or four cases where veteran soldiers proved up on their claims. I acted as proof witness at the final proof of William Tightmeier, Joseph Gillis, and George Rilea, and possibly one more.

Whenever a contract was signed I was careful to deliver the contract to W. N. Jones or Thad S. Potter, his representative, and none of the veterans was allowed to retain a copy of the contract. A number of the veteran soldiers signed mortgages in favor of W. N. Jones before me and I took their acknowledgments, and attached my notarial seal to said mortgages. I am quite sure that I did not take the acknowledgements of any of the veteran soldiers to deeds conveying title of their claims to W. N. Jones.

My recollection is that I made five trips from Portland to the homestead claim that was entered in my name. On one of these trips I was accompanied by my wife; on that occasion she and I remained on our supposed claim three (three scratched through and the word "two" written) days. On the other four trips I was on my claim each time for a period of five or six hours, more or less. A cruiser named Danforth built all the cabins on the claims on which the veteran soldiers were located. In October ("October" scratched through and "August" written), 1900, I made my first trip to the land in company with about a dozen other

veteran soldiers; the party being guided or led by Thad S. Potter, who, as the representative of W. N. Jones, paid all expenses for railroad fare, hotel bills at Toledo, team hire to and from the land, etc., the total sum of money that I got out of this deal with W. N. Jones was about $325.00 or thereabout, this total sum being made up of $200 individual profits on my own homestead claim and about $5.00 each for 25 veteran soldiers and widows who filed on homestead entries at my solicitation. I was a witness at the final proof made by William Tightmeier on his homestead entry at Oregon City, as before stated, although I had no personal knowledge of any facts regarding his residence, or lack of residence on his said homestead claim. When I testified as final proof witness for him I did so with the understanding that he had actually been on his claim, although I have since learned that he, himself, swears that he never got any closer to his alleged homestead claim than the town of Toledo, Oregon, which is located about eighteen miles distant from said claim.

JOHN L. WELLS.

Witness:

ODELL T. FELLOWS.

Subscribed and sworn to before me this 16th day of March, 1905.

THOMAS B. NEUHAUSEN,
Special Agent in Charge Second District."

Was this paper properly admitted in evidence?

The witness had testified in his direct examination, on page 37, that Mr. Jones had introduced him to Mr. Potter, and that he was not personally acquainted with Potter, although he had known of

him for a number of years. These extracts from the Neuhausen statement were called to the attention of the witness for the purpose of showing that they were contradictory to his testimony on the witness stand. That is to say, his testimony as a witness was to the effect that Jones introduced Potter to him, while this statement which the witness admits he made to Neuhausen, showed that Potter was the first one to interview him and that the preliminary arrangements were all made with Potter. This was not very material except to show that the witness had made contradictory statements concerning these matters.

Did this entitle the Government to introduce the entire statement to Neuhausen in evidence?

It will be noticed that the defendants did not introduce the document, or any portions of it, in evidence. They only used it as a basis for a cross-examination of the witness. The witness would, of course, have been entitled to see the document before answering the question if he had requested it, but he did not do so. Even though he had done so and had refreshed his memory from it, this would not have made it admissible as evidence.

Says Mr. Wigmore: "It follows from the nature of the purpose for which the paper is used that it is in no sense testimony. In this respect it differs from the record of best recollection which is adopted by the witness as the embodiment of his testimony, and as thus adopted becomes his present evidence and is presentable to the jury. Nevertheless, though the witness' party may not present it as evidence, the same reason of precaution which

allows the opponent to examine it allows him to call the jury's attention to its features, and also allows the jurymen, if they please to examine it for the same end. In short, the opponent but not the offering party, has a right to have the jury see it. That the offering party has not the right to treat it as evidence by reading it, or showing it or handing it to the jury, is well established. That the opponent may do this, or that the jury may of its own motion demand it, is equally conceded."

Wigmore on Evidence, Sec. 763.

In Railroad Co. v. O'Brien, 119 U. S. 99, an affidavit made by a physician as to the condition of plaintiff which he testified was correct and made by him at the time of examining the plaintiff, was admitted in evidence and the case was reversed for that reason. The Court says:

"It does not appear here but that at the time the witness testified he had, without even looking at his written statement, a clear, distinct recollection of ever essential fact stated in it. If he had such present recollection there was no necessity whatever for reading that paper to the jury. * * * It is, however, claimed in behalf of the plaintiffs that in his answers to their interrogatories, the physician testified apart from the certificate and the material facts embodied in it, and therefore the reading of it to the jury could not have prejudiced the rights of the defendant and for that reason should not be a ground of reversal. We are unable to say that the defendant was not injuriously affected by the reading of the physician's certificate in evidence. It is not easy to determine what weight was given to it by the jury in estimating the

damages to be awarded in view of the extent and character of the injuries received. The jury, for aught that the Court can know, may have been largely controlled by its statements. The practice of admitting the unsworn statements of witnesses prepared in advance of trial at the request of one party and without the knowledge of the other party should not be encouraged by further departure from the established rules of evidence."

That the defendants were entitled to question the witness about this statement cannot be denied.

In Chicago, Milwaukee & St. Paul Railway Co. v. Artery, 137 U. S. 507, it is said:

"A written statement signed by a witness containing statements different from those testified to by him, can be used on his cross-examination to impeach him. It is not necessary to call as a witness the person to whom or in whose presence the alleged contradictory statements were made."

It was further held that where portions of the paper were read to him and he was asked "Is that statement correct?" it was error to exclude his answer.

But does that give the Government a right to introduce in evidence all of his written statement?

It seems clear to us that it does not. The Court admitted it upon the ground that they were entitled to all of the conversation. If that were true that would not justify the admission of this paper. They could have asked the witness the circumstances under which he made the statement, asked him if he was positive that the statement in writing was cor-

rect, he could have refreshed his memory from the writing and could have testified as to the conversation fully, but that would not justify the introduction of the writing. He would not have been entitled to have testified to all of the conversation, but only so far as it was pertinent to explain the apparent contradiction in his testimony.

Mr. Wigmore, in his work on Evidence, Sec. 2113, under the title "Rules of Completeness," and discussing the question as to whether or not the whole of the utterance may afterwards be put in by the opponent, lays down these rules:

"(a) No utterance irrelevant to the issue is receivable.

(b) No more of the remainder of the utterance than concerns the same subject and is explanatory of the first part is receivable.

(c) The remainder thus received merely aids in the construction of the utterance as a whole and is not in itself testimony."

In Sec. 2115, Mr. Wigmore says:

"The general phrasing of the principle then is that when any part of the oral statement has been put in evidence by one party, the opponent may afterwards, on cross-examination or re-examination, put in the remainder of what was said on the same subject at the same time."

It will probably be contended that this statement, even though inadmissible, was not injurious to the defendants. The case quoted from the Supreme Court of the United States, O'Brien v. Rail-

road Co., 119 U. S. 99, is a complete answer to this argument, and if that was true in a case involving simply a question of money damages, how much more is it true in a case involving the liberty of the defendants. Furthermore, there is a great deal in this statement which was not covered by the direct testimony of the witness and it was not admissible at all. For instance, in the Neuhausen statement, the witness says: "Several of the widows made final proof on their claims and my understanding is that W. N. Jones eventually got those claims deeded to him." Again he says: "When I testified as final proof witness for him (William Tightmeier) I did so with the understanding that he had actually been on his claim, although I have since learned that he himself swears that he never got any closer to his alleged homestead claim than the town of Toledo, Oregon, which is located about eighteen miles distant from said claim."

The question in controversy, so far as the impeachment of the witness was concerned, related simply to the fact as to whether Mr. Jones introduced the witness to Potter or whether Potter introduced him to Jones. These statements referred to had no bearing upon that question whatever, but were highly injurious to the defendants and were not admissible upon any theory. Certainly the witness could not have been permitted to testify that he understood that Mr. Jones had secured deeds from these widows. Can he introduce such testimony so highly prejudicial under the guise of getting in all of the statement? Suppose the witness had stated to Neuhausen that he had heard that Jones was a murderer and a bigamist, or that he

had been informed that Jones had stated that he was guilty of the charge mentioned in the indictment. Will it be contended that this evidence could have been admitted under the guise of getting the entire conversation? We think the question answers itself.

Thus far, we have been discussing the question upon the theory apparently held by the Court in admitting the paper. We now propose to discuss the real question as it appears by this record, namely: Did the fact that we inspected this document make it admissible as evidence?

In England the rule was formerly held that it did so, as is shown by Wigmore on Evidence, Sec. 2125. He further shows, however, that there never was any reason for the rule and that it is unsound. The alleged reason for the rule was a desire to penalize one party for attempting to know beforehand the tenor of the evidence in possession of the other party. Says Mr. Wigmore:

"The answers to this plausible suggestion were plain. First, the very principle whose evasion was thus penalized was itself unfair and reprehensible. Its vices have been already considered. (Sec. 1847.) It is enough here to repeat that the common law notion of keeping a party entirely ignorant of the evidence possessed by his opponent, was one to be discountenanced, not maintained. Moreover, by a bill of discovery in equity, such documents could have been obtained even under the common law system, and similar statutory proceedings at law now are authorized almost everywhere. Thus, by the judgment of posterity and by the contemporary

standards of equity, the penalty of the present rule was in truth imposed upon a party who was attempting to do no more than justice and good sense entitled him to do, namely, inform himself at the trial of the documentary evidence available against him. * * *

There is then, not only no sound reason for establishing such a penal rule, but it is itself open to abuse and merely adds to the sportsmen's rules elsewhere noticeable in the common law system. Moreover, it is totally out of harmony with the modern statutory procedure for discovery at law."

The rule has been abandoned in England. In Parnell Commissions Proceedings, Times Report, Pt. 25, page 169, President Hannen:

"The important fact of their having called for it does not alter the matter at all. You produce it. If they do not put it in you are not on that ground entitled to put it in. You have met their challenge. That is what it comes to."

Some of the American Courts have adopted the old English rule. The authorities upon this question are thoroughly reviewed in the case of Austin v. Thompson, 45 N. H. 113. That able Court refused to follow the rule, saying:

"We see no sufficient reason for a rule that is at variance with the general course of our practice and that can hardly facilitate the administration of justice, since if it has any practical effect in addition to the rules for the admission of competent evidence, it must be to compel the Court to allow incompetent evidence to go to the jury."

After reviewing the authorities, the Court again says:

"There is, therefore, no such weight of authority as should lead us to adopt a rule which does not commend itself to our judgment and is not in accordance with our practice in analogous cases."

In Eugene Smith, Executor, v. Fredericka Rentz, 15 L. R. A. 138, the Supreme Court of New York reviewed the authorities upon this question and refused to follow the so-called rule. The Court says:

"The claim that it gives the party calling for a paper an unfair advantage if he may inspect it and then decline to put it in evidence, seems to us rather specious than sound. The same objection would lie in cases of bills for discovery; but it was the settled rule that an answer, though under oath, was evidence only for the party who obtained it. The party who has in his possession books or papers which may be material to the case of his opponent has no moral right to conceal them from his adversary. If on inspection, the party calling for them finds nothing to his advantage, his omission to put them in evidence does not prevent the party producing them from proving and introducing them in evidence if they are competent against the other party. The party calling for books and papers would be subjected to great hazard if an inspection merely, without more, would make them evidence in the case. That rule tends rather to the suppression than the ascertainment of truth, and the opposite rule is, as it seems to us, better calculated to promote the ends of justice."

In many States the so-called rule has been abol-

ished by statute. In Oregon, Sec. 772, B. & C.'s Code. In California, C. C. P., Sec. 1939.

But even if the Court should be of the opinion that this rule of evidence is in force, this document was not properly admitted, because the rule only applied where the document was produced upon notice or by a subpoena duces tecum and did not apply to a case where the paper was voluntarily given to the opponent, as was in this case. The record shows, page 900: "Thereupon the defendants' counsel, to who was handed the written statement by Mr. Heney, examined the witness," etc.

This question was before the Supreme Court of Pennsylvania in the case of the Farmers & Mechanics Bank v. Israel, 6 S. & R. 292, and was squarely decided. The Court said:

"The other point insisted on at the trial, that a paper handed to the opposite counsel, pursuant to a request, becomes competent evidence for both parties, although it were incompetent before, has very properly not been pressed. Admitting for the sake of the argument, that books delivered and inspected, after being called for, become evidence as well for the party producing them, as the party calling for them, although they would be otherwise incompetent, yet the reason of the rule shows its extent. A party would have an unreasonable advantage, who could use the arm of the Court to wring his antagonist's books out of his hands and use them against him, or not, as they might be found to answer his purpose; and he must, therefore, according to the English practice, either not have recourse to the measure at all, or take it at the risk of making

the books evidence at all events, and for both parties. Here, however, there was no call, either for books, or through the Court, but a mere request with which the other party was not bound to comply; and the production of the paper as an act of courtesy, cannot change its character, as to competency. There must be judgment on the verdict."

This would seem to be decisive. All of the cases upon this subject referred to in the books seem to be civil cases. We have not, so far, been able to find a case where this was attempted in a criminal case and it seems to us that this would present a somewhat different question. The Constitution provides that a defendant is entitled to meet his witnesses face to face. In this case, let us assume for the sake of argument, that every witness who testified had made a similar statement to Mr. Neuhausen and that at the trial these statements were in possession of the Government and lying on the table. The defendants' counsel had asked permission to examine them, which was granted. As soon as this was done, the District Attorney could introduce them all as evidence and rest his case without putting a single witness upon the stand. Would not this be in violation of his constitutional rights to meet the witnesses face to face? The defendant could be denied the opportunity of cross-examining the witnesses whose testimony had convicted him. It seems to us that the mere statement of the proposition is sufficient.

There is still another reason why this was not admissible, namely: its execution was not proven. Certainly it cannot be contended that it was entitled to admission without proof that it was the

paper or statement which the witness had made to Mr. Neuhausen, and the one which he signed; but no evidence of that kind was offered.

Says Mr. Wigmore, in note to Sec. 2125:

"When a document is called for and the opponent produces it from his possession, the execution of it remains to be proved. This mere production by the opponent is not a waiver or proof of execution and the party calling for it is still obliged to prove its execution. (Ante Sec. 1298.)"

In the section last cited, Wigmore, Sec. 1298, the learned outhor goes on to show that there was formerly a contention made that where one party produced a paper for the inspection of the other, that the party inspecting the same might assume it to have been properly executed because found in the possession of the opposite party. He shows that there was some fluctuation of opinion, but that this doctrine has been entirely repudiated.

The law, then, is that we could not have introduced this document without first proving its execution. Certainly, then, the parties who produced it could not do so.

Government Exhibit No. 26.

In Government Exhibit No. 25, just referred to, there is a statement that "a typewritten agreement was prepared by or through W. N. Jones, and a copy of this typewritten agreement is attached to this affidavit." After Exhibit 25 was admitted, the United States District Attorney offered a paper which he claimed was the paper referred to in Exhibit 25 as being attached thereto. The defendants'

counsel objected to the paper because it was incompetent, irrelevant and immaterial. The paper was introduced in evidence, and is as follows: (See Record Page 867.)

"THIS AGREEMENT, Made this ——— day of ———, 1900, between ————————, of Portland, Oregon, the party of the first part, and Thad S. Potter, the party of the second part, WITNESSETH:

That, whereas, the party of the first part is entitled to the benefits of the Act of Congress of June 8, 1872 (Sec. 2307, Revised Statutes), giving homesteads to honorably discharged soldiers and sailors, their widows and orphan children, and desires to avail herself of the privilege therein granted by taking a homestead claim, and the party of the second part is in the possession of information relative to the existence of public lands within the State of Oregon, subject to entry;

Now, therefore, the party of the second part in consideration of the covenants and agreements on the part of the party of the first part, hereinafter stipulated to be kept and performed hereby agrees to give to the party of the first part information which will enable her to locate and file a homestead claim upon 160 acres of the public lands of the United States, situated within the State of Oregon, and the party of the first part hereby agrees to pay to the party of the second part, as compensation for such information, and for his services to be performed in the preparation of the papers and affidavits necessary to be prepared and used in making such filing, the sum of one hundred and fifty dollars

to be paid at the time and in the manner hereinafter designated.

The party of the first part further agrees to employ and does hereby employ the party of the second part to cultivate the land to be taken up under the foregoing agreement or so much thereof as is required and for the time required by the laws of the United States, in order to perfect title thereto, and to pay the said party of the second part therefor the sum of two hundred and fifty dollars, to be paid at the time and in the manner designated; and the party of the second part hereby accepts said employment, and agrees to do and perform or to cause to be done or performed all work and labor necessary to be done and performed, upon said premises in order to comply with the laws of the United States.

The party of the second part hereby agrees to advance to the party of the first part if required, the amount of fees required at the U. S. Land Office in order to make and perfect such filing, and all such necessary expenses of the party of the first part in connection therewith not to exceed the sum of forty dollars, and the party of the first part agrees to re-pay to the party of the second part all sums of money so advanced at the time and in the manner hereinafter designated.

The party of the second part further agrees that after final proof shall have been made upon said claim he will, at the option of the party of the first part, procure for the said party of the first part a loan not to exceed the sum of $640.00, to be secured by said mortgage upon said claim, and immediately upon procurement of such loan all sums of money

herein stipulated to be paid to the party of the second part by the party of the first part under the terms of this agreement, together with all sums advanced to the party of the first part, by the party of the second part, under the terms of this agreement shall become due and payable and shall be paid out of the loan so secured and it is further understood and agreed by and between the parties hereto that the payment by the party of the first part to the party of the second part of all sums of money hereinbefore designated shall be conditional upon the procurement by the party of the second part of the loan hereinbefore mentioned, if the same shall be required.

In case the party of the first part shall not desire to avail herself of the loan hereinbefore mentioned, then and in that event, all moneys advanced to the party of the first part by the party of the second part under the terms of this agreement, together with all sums of money hereby agreed to be paid to the party of the second part by the party of the first part shall become due and payable as soon as final proof shall have been made upon said claim.

WITNESS our hands the day and year first above written.

Witnesses:"

The statement, Exhibit 25, goes on to say that a number of soldiers' widows signed agreements similar to this in the presence of the witness and Mr. Jones.

Now, this paper, Exhibit 26, taken in connection with the statements contained in No. 25, proves, if it

proves anything, that Jones had, at a previous time to that mentioned in the indictment, been engaged in a scheme or conspiracy to defraud the Government out of some other lands by using the widows of soldiers to do so. If the evidence had no such tendency and did not indicate any guilt or wrongful act upon the part of the defendant, then it was open to the objection that it was immaterial, and ought not to have been admitted for that reason. But the District Attorney evidently thought that it had a tendency to show the very thing which I have mentioned, namely: That Mr. Jones had been engaged in some other scheme to defraud the Government.

Now, if that is true, by what right is this paper introduced in evidence? No witness has testified in Court that Mr. Jones had anything to do with it or ever saw it, but the sole basis for its introduction is the statement made in the Neuhausen statement of Mr. Wells, which we think we have conclusively showed was not admissible. But even though it were admissible because we had inspected it, the statements contained therein certainly could not form the foundation for the introduction of other documents.

Again, the only possible theory upon which Exhibit 25 was admissible, as we have shown, was that we had inspected it. We did not inspect No. 26 and therefore it could not be admissible upon that ground. If the learned District Attorney had wished to bind us by our inspection of it he should have submitted it with the other paper for our inspection. He certainly cannot give us a part of a paper to be inspected and then introduce another separate part upon the ground that we have in-

spected it. As will be plainly apparent from the record, however, neither the District Attorney nor the Court put its admission upon that ground, but only upon the ground that having asked for a part of the conversation between Wells and Neuhausen, they were entitled to have all of that conversation. How does that make admissible a paper prepared by Mr. Jones and given to Mr. Wells? It certainly is not a part of the Wells-Neuhausen conversation.

The Government offered in evidence a paper signed by George F. Merrill, Government's Exhibit 41, page 949, which was and is as follows, to wit:

"In re Homestead number 14,234, made June 18, 1902, by George F. Merrill, for N. E. ¼ S. W. ¼ N. ½ S. E. ¼ Sec. 32 and N. E. ¼ S. W. ¼ Sec. 33, Tp. 8 S. R. 10 west, Final Certif. No. 6567, dated Sept. 8, 1902.

State of Oregon, County of Multnomah—ss.

George F. Merrill, being first duly sworn, upon his oath deposes and says that he is seventy-two years of age, and that his family consists of a wife and six children, that he is by occupation a boat-builder, and has resided in Portland, Ore., and vicinity for the last past twenty-two years, that he is the same person who made the above homestead filing and entry on date of June 18th, 1902; that the improvements on said claim consist of a split shake house about 14x16 feet square with shake roof, one door, one four-light window, but without floor or fireplace, and no place for the escape of the smoke, about one-half acre slashed and fenced with brush, no cultivation except a small patch which was planted to garden truck for one season. That the

total value of all the improvements on said claim would not exceed $100.00; that he first went upon said land in Oct., 1900, at which time he camped on the claim for one night and one day, that there was no house on the claim at that time, that he next visited the claim in March, 1901, remaining for one day and night, that the next and last visit to the land was on date of Sept., 1901, for a period of one day and night, that he started to make another visit to his said claim during the month of March, 1902, and after going as far as 'the new landing' on the Siletz River, which is about six or eight miles from the claim, that he could proceed no farther on account of a heavy storm. The witness here interrupting said There is a little difference there. They got that—it ought to be 1901, we couldn't get down there—they got it March, 1902. Mr. Heney continuing "and that he has not in fact been on the claim since his visit in Sept., 1901. That between the dates of Oct. 9, 1900, and April 5, 1901, he went to John L. Wells' office in Portland, Oregon, to have his pension papers filled out, and at that time and place he entered into an agreement or contract, as he thinks, with W. N. Jones, through John L. Wells, who, as he understood, was acting as agent for said Jones, in which it was agreed in said contract that said W. N. Jones was to make certain improvements upon said claim and pay all the expenses of the claimant in going to and from said claim, and it was further understood that when the claimant had made final proof on his said claim he was to receive from said Jones the sum of $200 and execute a mortgage on his said entry to said Jones for the sum of $725, that Jones made, or caused the improvements to be made, on said claim, and paid all other ex-

penses of the claimant as agreed upon, and on date of Sept. 8, 1902, claimant exectued a mortgage to said W. N. Jones for the sum of $725, at which time the said Jones paid the same claimant the sum of $200.00.

Deponent further says that he received official notice from the Oregon City Land Office that his said entry had been contested by J. F. Clark, that some time after receiving the notice of this contest, W. N. Jones came to him, at which time it was agreed that said Jones was to look after the claimant's interests in said contest, and that he, the claimant, executed a second mortgage to said W. N. Jones, for the sum of $200 for that purpose. The claimant did not appear at the hearing of said contest, and that he did not pay or authorize said Jones or any other person to pay any sum of money to have contest proceedings withdrawn against his said homestead.

Deponent says that he has no knowledge of his said claim having been contested by C. H. Young on March 14, 1903, or by E. R. Miller on May 2, 1903, and that he never authorized any person or persons whomsoever to act or appear for him in relation to any contest against his said claim except that brought by J. F. Clark on date Nov. 29, 1902.

GEORGE F. MERRILL.

Witnesses:
LOUIS F. ALLEN.
S. J. BURNS."

The witness testified that he had made a statement to Hobbs and that afterward he went to Mr. Jones' office and signed a paper asking for a rehearing of his case. In that paper, which is Gov-

ernment's Exhibit 61, the witness refers to a report made by Special Agent A. J. Hobbs, as follows:

"On March 10, 1904, Special Agent A. J. Hobbs transmitted a report, accompanied with affidavits of entryman and his two witnesses acknowledging false swearing in the testimony given at time of proof and alleging that entry was made at instance of and for the benefit of one W. N. Jones, and that entryman never resided upon or cultivated the land and that the alleged improvements thereon were constructed and paid for by said Jones."

This is the only excuse for the introduction of this paper, Government's Exhibit 62. In what way did that make Exhibit 62 admissible? It was made ex parte, not under oath, not in the presence of either of the defendants. It was not called for by either of the defendants. The Government was not asked to produce it at the trial. No question was asked of the witness about his conversation with Hobbs, as was the case with reference to Government's Exhibit No. 25, and we are utterly unable to conceive of any theory which would make this paper admissible. If the Government has one we should be glad to be informed as to what it is.

If it is admissible against the defendants, then it is hard to conceive what kind of a statement made by any of the entrymen would be inadmissible. It was highly injurious to the defendants, as an inspection will readily show. It shows that very little cultivation or improvements were on the land and that the witness had only visited his claim a few times and remained there but a short time at each visit, and all tends to support the theory of the

Government. It may be said that the defendants were not injured because the witness testified upon the stand to substantially the same statements as are made in this affidavit. Is it true that the testimony of the witness may be strengthened by showing that at other times he has told substantially the same story as he tells upon the witness stand? If so, the answer is a good one. Otherwise not. If this was admissible, then the Government had a right to call witnesses who had conversations with Mr. Merrill about the character of his improvements and the length of his stay, etc., and show by them that Mr. Merrill had at other times and other places told substantially the same story, and thus impress upon the jury the truth of his statements.

We shall not dignify this question by arguing it further. We submit that there is no reason and no authority that will, under the most strained construction, justify the introduction of this evidence.

The Government called one Daniel Clark as a witness. He is one of the homesteaders mentioned in the indictment and his proof is assigned as one of the overt acts. He testified, amongst other things, that he had made a statement to Mr. Hobbs, an Agent of the Land Department, and that he afterwards went to Mr. Jones' office and signed another paper. He identified his signature to the paper and it was then offered and admitted in evidence over the objection of the defendants that it was incompetent, irrelevant and immaterial, and was marked "Government's Exhibit 263," and is as follows, to wit: (See Record Page 675.)

"Govts. Ex. 263.

Portland, Oregon, May 13th, 1904.

Honorable Commissioner,
of the General Land Office,
Washington, D. C.

Sir:

Special Agent A. J. Hobbs, has served me with a notice of suspension of my Homestead entry No. 14233 in the Oregon City, Oregon Land District, in accordance with your letter of ——— ,1904, to the Register and Receiver, in which letter it is stated:

"On March 10th, 1904, Special Agent A. J. Hobbs, transmitted a report accompanied with affidavits of entrymen and his two witnesses, acknowledging false swearing in the testimony given at the time of proof and alleging that the entry was made at instance of and for the benefit of one, W. N. Jones, and that entryman never resided upon or cultivated the land and that the alleged improvements thereon were constructed and paid for by said Jones."

I deny that I swore falsely at final proof, or that I took the land for one, W. N. Jones, or for the benefit of any person or persons other than myself. I assert that I complied with the law in regard to residence as well as I was able to do, considering the broken country, the unfavorable winter climate, lack of roads, and distance from supplies, and the age of myself and wife. Although the actual building of my house, the clearing of some of the land, and the construction of trails, and the cultivation of some of the land for two seasons, was performed by others, because of the fact that on account of age I was physically incapable of doing such manual labor,

yet all the work was done at my express desire and direction and paid for by me after final proof by a mortgage on the land. I understand that the regulations of the Department permits this to be done. I believe that Special Agent Hobbs has never made a personal examination of my claim.

For the foregoing reasons and facts, I respectfully ask that you set a time and place of a hearing in order that all parties in interest may be heard, to the end that the title to my homestead may be settled and the patent issued.

Very respectfully,

DANIEL CLARK."

It is possible that this paper was competent as against the defendant Jones, but it was offered and received against all of the defendants, including, of course, the defendant Potter. The Court will notice that it is dated May 13, 1904, one year, eight months and eight days subsequent to the final proof. It was an act of one of the alleged conspirators only long after the purpose of the conspiracy had been accomplished so far as contemplated by the alleged conspirators. The allegation is that they were to defraud the Government by means of the false proofs and that in pursuance thereof the defendants procured the homesteaders to make the false proofs on the 5th of September, 1902. The law is, of course, well settled that no act of a conspirator binds his co-conspirators after the completion of the conspiracy.

This being true, we are unable to see how this action of Jones was admissible as against the defendant Potter.

After the admission of this document, the District Attorney then called the attention of the witness to a paper and the witness identified his signature thereto and the same was offered in evidence and marked Government's Exhibit 264. When this paper was offered the defendants' counsel stated to the Court that if it was made for the purpose of impeachment, they objected on the ground that the United States Attorney could not offer evidence impeaching his own witness, unless he first showed surprise. That if it was offered for the purpose of corroborating him, it was incompetent for that purpose, and if it was offered as substantive evidence in the case it was incompetent and hearsay. Thereupon the United States Attorney said to the Court that it was not offered to impeach the witness, not offered to corroborate the witness and it was not offered as substantive evidence in the case. Further explaining, he stated that the offer was not made as substantive evidence of facts stated in the affidavit, but as circumstances to be considered by the jury in connection with the circumstances of the other paper having been signed by Jones. The objection of the defendants was renewed on the ground that the paper was incompetent and irrelevant, but the Court overruled the objection and admitted the paper as against the defendant Jones only, and to this the defendants excepted and their exception was allowed. The defendants also objected that it was not shown that Mr. Hobbs, the Special Agent of the General Land Office, had any authority to administer the oath. The District Attorney offered no evidence to show that he did have such authority, but claimed that he had been directed by the Commissioner of the General Land Office or the Secre-

tary of the Interior to investigate these claims and that this gave him authority to administer an oath. Said Exhibit 264 is as follows: (See Record Page 1011.)

"In re H. E. No. 14233, for N. E. ¼ S. E. ¼ Sec. 33, and N. ½ S. W. ¼ S. E. ¼ S. W. ¼, Sec. 24, T. 8 S. R. 10 West, made June 18, 1902,

by

Daniel Clark.

State of Oregon, County of Multnomah—ss.

Daniel Clark being first duly sworn deposes: My age is 61 years, my occupation that of a day laborer, working at various kinds of light work; my residence and postoffice address is Portland, Oregon; I am a man of family, consisting of a wife and five children, and that myself and family have resided in the City of Portland, about seventeen years, and have resided there continuously for the last past seven years; that I am the same person who made the above described entry on June 18, 1902, and made my final proof thereon before the County Clerk of Lincoln County, Oregon, on September 5, 1902, that the improvements on my said homestead consist of a split shake house, no floor or fireplace nor any place for the escape of smoke; that there is about one or one and one-fourth acres slashed on the same homestead and that a small patch of ground of a few rods square has been dug up and been planted in garden vegetables for one season; that the total value of all improvements on said homestead would not exceed $100.00; that all the improvements on said claim and what cultivation was done on the claim was done by or at the instance of one, W. N. Jones, of Portland, Oregon.

Deponent further states that he made three visits to said land, making the trip each time from his home in Portland, Oregon, as follows:

One visit in October, 1900, one visit each in March and September, 1901, that he remained on the land one day and one night at each visit thereto, making a total of three days and nights in all, which comprises the time spent by him on said claim; that his family nor any of them have never been upon the land for the reason that his wife is an invalid, and could not go to the claim to reside thereon; that he made an attempt to reach the claim in the month of March, 1902, but on account of high water and a heavy storm which was raging at the time, he was unable to proceed further than what is known as 'Canoe Landing' on the Siletz River, which is about six or eight miles from the said homestead, from which point he was compelled to return to his home in Portland, Oregon, which is more than one hundred miles away.

Deponent further states that between the date of October 1st, 1900, and April 30th, 1901, he entered into a contract with W. N. Jones of Portland, Oregon, which contract was made through John L. Wells, and at said Wells' office in Portland, Oregon, in which contract it was agreed that said Jones was to make all improvements required by the Government on said claim and was to pay all of the entryman's expenses in going to and from Portland, Oregon, to his said homestead; that said Jones did make or cause to be made all the improvements and cultivation that was ever made on said claim. That claimant was to go upon the claim at least once in

every six months until final proof has been made on the claim, at which time the claimant agreed to execute and did execute a mortgage to said Jones on his said homestead for the sum of $720.00, at which time the said W. N. Jones paid said claimant in cash, or a check, the sum of $200.00. That all the expenses of making the filing, going to and from Portland, Oregon, to my said claim was paid by W. N. Jones, or J. L. Wells for said Jones. Claimant reserved the right to pay off the mortgage given to said W. N. Jones at any time.

That about the latter part of December, 1902, or the first part of the year 1903, he received official notice from the U. S. Land Office at Oregon City, Oregon, that his claim had been contested by one, J. F. Clark. That at the time set for the hearing in said case, he went to the United States Land Office at Oregon City, Oregon, but that he never gave any testimony in the case, and does not know that any hearing was had in the case. That he saw Mr. W. N. Jones at Oregon City, Oregon, on that day, but does not know what action, if any, was taken by W. N. Jones, or any one else, or what disposition was made in the contest of said Clark. That he did not employ any attorney to look after the matter for him, and never paid, or authorized any person or persons to pay anyone any sum of money to withdraw any contest brought against his said entry by J. F. Clark or any other person. That he never had any knowledge of his said homestead having been contested by C. H. Young on March 4, 1903, or by R. W. Tompkins, on May 2, 1903. That he never received notice of such contests, and that whatever might have been done, if such contests were initiated

against said claim, was so done without his knowledge.

DANIEL CLARK.

Witness:
WM. ALBERS.

Subscribed and sworn to before me this 4th day of March, 1904.

A. J. HOBBS,
Special Agent G. L. O."

With reference to the admission of this paper, the Court will notice that it has not the excuse for its admission that was made for the admission of the statement of Wells and of Merrill.

In the statement made by Wells to Neuhausen, it was claimed that it was admissible as a part of a conversation between Neuhausen and Wells concerning which the witness had been questioned by the defendant.

In the Merrill paper, Government's Exhibit 41, page 949, there was a statement referring to another paper which it was claimed made it admissible, but this paper has no such reason for its admission. It is simply an ex parte statement made out of Court long after the final proof which was to be the consummation of the conspiracy, made before an officer who, so far as appears, had no authority to administer an oath, though we apprehend that would not make much difference, and if its admission can be justified there is no kind of an ex parte statement that is not admissible, as against a defendant.

We are curious to know what reason the learned counsel for the Government will assign for the in-

troduction of this paper. He stated that it was not for the purpose of impeachment, and that it was not for the purpose of corroborating the witness and was not offered as substantive evidence in the case, but only as a circumstance. If this can be upheld then all that will be necessary to procure the admission of any evidence of any kind in a criminal case, will be to call it a circumstance.

It will probably be urged that it did not injure the defendants. As observed with reference to the other documents of this character, if it contained statements damaging to the defendants it was injurious, and if it contained no such statements it was immaterial and ought not to have been admitted. The presumption is that it was injurious. There is, however, a statement in this document that is very injurious to the defendants, and that is the following: "That claimant was to go upon the claim at least once in every six months until final proof has been made on the claim." The written agreement between Mr. Jones and this witness, which is in evidence, Government's Exhibit 26, page 900, contains no such provision, but provides that he was to comply with the law with regard to residence in every respect. The witness is on the stand in the trial of this cause and testifies to no such agreement, either with Mr. Jones or anyone representing him, but in this document they get the evidence before the jury that there was an understanding or an agreement with Mr. Jones that the witness only had to go upon his claim once every six months. This, taken in connection with the Court's instruction as to the requirements of residence and cultivation, was a very damaging statement for the defend-

ant, and we submit that its admission was a grave error.

Is Evidence of the Acts of a Third Party Not Connected With Defendants Admissible for the Purpose of Raising a Presumption Against Them?

John Miseck was called as a witness, page 915, and testified that he was Postmaster at the postoffice called Roots; that he built certain cabins on the land in controversy for Mr. Jones and was paid by Mr. Potter or Mr. Jones. **That he did not remember having any talk with Mr. Jones in regard to the mail.** That as Postmaster he received mail for some of the parties whose claims he had built cabins on. Thereupon the District Attorney asked the witness what he did with that mail, and over the objection of the defendants' counsel that it was irrelevant and immaterial, the witness testified that the mail of John L. Wells, George Rilea, Richard Depue, Oliver I. Conner, Benjamin S. Hunter, Franklin Hummel, Edward C. Brigham and Nelson B. Smith was received at that postoffice. The District Attorney then asked, "Do you remember what you did with it?" stating that he proposed to show what was done with the mail addressed to those people and that it was forwarded to Jones' office and that all the mail that went from the Oregon City Land Office addressed to homesteaders was forwarded to Jones' office. The witness answered, "I do not remember now, but it was forwarded, I guess, if it was registered mail it was forwarded back either to Jones or the other party. It is so long now I do not remember. It would show on the book, though." Witness further testified that he did not have the book. That Bert Blauvelt, Daniel W. Clark, George F. Merrill,

Granville C. Lawrence, James Lanphere, Herman K. Finch and Addison Longenecker all got their mail there. That he could not remember what was done with each mail separately, **but that some of it was sent back to Mr. Jones.**

In what manner or under what theory could this testimony be admitted without showing in some manner that Mr. Jones had authorized or directed this mail to be sent to him? There is not a hint in the testimony that such was the case, the only evidence on the subject being that of this witness, who testifies that he has no recollection of Mr. Jones ever mentioning the matter, and yet the Government is permitted to prove that this Postmaster forwarded the mail of these homesteaders to the defendant Jones. The evident purpose and intention was to create an inference against the defendant Jones. That is to say, to authorize the jury to infer, first, that these homestead claimants were not bona fide residents on their claims. And second, that Mr. Jones knew they were not such and had arranged in some way to have their mail forwarded to him. Surely it is not necessary for us to make an argument upon the question of the admissibility of this testimony. It was the merest hearsay as to the defendants.

A Presumtion Cannot Be Based Upon a Presumption.

The only possible theory of which we can conceive to make it admissible would be this: That since these letters were forwarded to Mr. Jones, a presumption would arise that he received them. Having received letters addressed to these home-

steaders at Roots, and their being forwarded to him, he would be presumed to know that the homesteaders did not live upon their homesteads. But this cannot make them admissible, because it is basing a presumption upon a presumption. That they were forwarded to Mr. Jones may be taken as a fact, but that only creates a presumption that he received them. If he received them, at the most it could only create a presumption in his mind that the homesteaders were not living on their homesteads and therefore did not receive their mail. We do not believe that this would be the inference to be drawn. We think the inference would be that Roots was their home and their postoffice and for some reason they were temporarily absent. But giving it the strongest presumption possible against the defendants and still it is nothing more than a presumption based upon a presumption. That cannot be done. **A presumption must be based upon a fact.**

A presumption of fact is a logical argument from a fact to a fact. Or it is an argument which infers a fact otherwise doubtful from a fact which is proven. Hence, **a presumption of fact, to be valid, must rest on a fact in proof.**

Wharton's Criminal Evidence, Sec. 707.

No inference of fact or of law is reliably drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove facts, the circumstances must be proved and not themselves presumed.

Wharton's Criminal Evidence, Sec. 707, Note 2.

A presumption which the jury is to make is not

a circumstance in proof, and it is not therefore a legitimate foundation for a presumption. It, the presumption, must rest on established facts.

Douglas v. Mitchell's Executors, 35 Pa. St. 440.

King v. Burdette, 4 Barnwell & Ald. 160.

One fact cannot be presumed from another which is itself but an inference.

McAleer v. McMurray, 58 Pa. St. 126.

State v. Lee, 17 Ore. 488.

People v. Kennedy, 32 N. Y. 145.

Copeland v. State, 7 Hump. 484.

Can Evidence of an Attempt by Defendants to Locate Persons on Other Lands in a Lawful Manner Be Introduced for the Purpose of Raising a Presumption Against Them?

The witness Wells was asked the following question by the District Attorney: "And did you in 1900 have any talk with Potter or Jones in relation to securing soldiers' widows to file upon lands?" And the witness answered, "Yes." Thereupon the United States Attorney asked the following question: "Now, you may state what the conversation was and where it took place."

Counsel for the defendants objected to the question because it was incompetent, irrelevant and immaterial, and that the answer could not support any allegation in the indictment and that the time referred to in the question was more than three years before the finding of the indictment and is not competent to prove the charge alleged in the indictment.

The Court allowed the question to be asked and the witness testified that he had a conversation with the defendant Potter, who asked him to call upon Jones, and that he called upon Jones and Jones asked him in substance to procure the widows of soldiers who had never availed themselves of the right of homestead entry to file upon lands, and then proceeded to relate an arrangement by which he procured the widows of soldiers to file upon some land. What lands does not appear. This evidence was offered and admitted for the purpose of showing system and knowledge.

Under the decision of this Court in the Biggs case, this would probably be admissible if it had any tendency to show system or design, but since it does not appear where the widows were to file upon lands or what land they were to get, we are unable to see how it shows system, design or knowledge. The widows of soldiers who had not availed themselves of their homestead rights had a right to file upon lands. As the law stood at that time, they could file upon a homestead and make final proof without ever going upon the lands.

Lamb v. Ellery, 10 Land Decisions 528.

Ex parte Ella I. Dickey, 22 Land Decisions 351.

These decisions were subsequently overruled by Secretary Hitchcock in the Anna Bowes case, 32 Land Decisions 331, but certainly that can make no difference with the question under discussion. So far as appears from the testimony, the soldiers' widows were to comply with the law in every respect in the procurement of their lands. Does that

raise any presumption of guilt on the part of the defendants? If the lands were legally acquired the Government would not have been defrauded. Does proof of an attempt to acquire lands in a perfectly legal and proper manner raise the presumption that parties were intending or subsequently intended to acquire other lands by defrauding the Government and by failing to comply with the law? The learned District Attorney and the equally learned Judge who tried the case were able to see a presumption of that kind, but we confess it is utterly beyond our comprehension. How can the fact that persons attempt to get some land legallly and properly raise any presumption or inference that long subsequent to that time they undertook to get other lands from an improper motive? It seems to us that if there is any presumption it would be the other way. The fact that they went about procuring the land lawfully in the first place would tend to raise a presumption that if they undertook to acquire other lands they would do that lawfully.

A similar question was before Judge Carland recently in the case of United States v. John I. Newell, et al., in the District Court of the Southern Division of the District of South Dakota. The defendants were indicted for conspiracy to defraud the Government by procuring soldiers' widows to file upon lands and then lease them to the defendants. It was shown that the widows never lived upon the lands at all. At the conclusion of the evidence for the Government, the defendants moved the Court to advise the jury to acquit the defendants. The Court said:

"The indictment in this case does not charge the

defendants with entering into a conspiracy for the purpose of committing a crime against the United States. It does charge the defendants with entering into a conspiracy for the purpose of defrauding the United States and the indictment charges that these defendants entered into a conspiracy to defraud the United States by means of false, feigned, fraudulent, untrue, illegal and fictitious entries of said lands under the homestead laws of the United States."

The Court then recapitulated the testimony, and said:

"It is shown by the authorities cited by counsel for defendants that at the time the transactions were had which are alleged in the indictment, it was the law as laid down by the Secretary of the Interior that soldiers' widows were not required to live upon land filed upon by them and that where the land filed on was chiefly valuable for grazing that a lease of the land was not unlawful. The evidence shows that the land in question was valuable only for grazing. In December, 1903, the law or ruling of the General Land Office was changed so as to require residence of soldiers' widows on lands filed on by them, but that was after the commission of the acts complained of."

The jury were accordingly directed to acquit.

(This opinion was filed October 23, 1906, by his Honor, Judge Carland, but we have not been able to find it in the published decisions. I secured a certified copy of it from the Clerk of the Court.)

Can the Application Papers of an Entryman Be Introduced Under an Allegation of an Attempt to Defraud by Means of "False Proofs"?

The Government, after proper proof of identification, offered in evidence the homestead application papers of James Lampheir, which are Government's Exhibits 112, 113, 114, 115, 116 and 117. (See pages 456 to 459 of the record.) The defendants objected to them on the ground that they were incompetent, irrelevant and immaterial and particularly for the reason that they were papers of application for a homestead and not proofs of settlement, which is the means of the conspiracy set out in the indictment. The objection was overruled and an exception allowed.

If this indictment is sufficient to charge the defendants with anything, it is a charge that they conspired to defraud the Government by false proofs of residence and cultivation. An application is not proof. It never can be proof. Proofs of residence and cultivation are, of course, the final proof papers, and certainly if the defendants were notified of anything, they were notified that the proofs were the means relied upon and therefore the application papers have no relevancy or materiality in this case.

Are the Acts of the Government Officials Not in the Presence of the Defendants Admissible for the Purpose?

Government's Exhibit No. 63.

George F. Merrill, being a witness for the Government, was shown a paper and identified his signature on it, and it was then offered in evidence. The

witness testified that he had received it from the Land Office and that he got it through the mail. The defendants objected to its admission as incompetent, irrelevant and immaterial, but it was admitted and exception allowed, and marked Government's Exhibit No. 63. It is as follows: (See Record Page 370.)

"Govts. Ex. 63.

(Original)—4-271a.

DEPARTMENT OF THE INTERIOR,
United States Land Office,
Oregon City, Oregon, April 13th, 1904.

George F. Merrill,
Roots, Oregon.

Sir:

You are hereby notified that the Commissioner of the General Land Office by letter dated March 26th, 1904, has suspended your Final Homestead No. 6567 for the NE ¼ of SW ¼, N ½ SE ¼ Sec. 32 and NW ¼ of SW ¼ Section 33, Tp. 8 S. range 10 West, Oregon City Land District, on charges contained in a report by a special agent.

The charges of which said F. Hd. 6567 is suspended are summarized as follows:

On March 11, 1904, Special Agent A. J. Hobbs transmitted a report accomanied with affidavits of entryman and his two proof witnesses acknowledging false swearing by each in the testimony given at time of proof, and alleging that entry was made at instance of and for the benefit of one W. N. Jones, and that entryman never resided upon or cultivated the land and that the alleged improvements thereon were constructed and paid for by the said Jones.

You will be allowed thirty days within which to file application in this office for a hearing, and your failure to apply for a hearing within the time specified will be taken as an admission of the truth of the charges against said Final Hd. 6567, and the same will be cancelled.

Very respectfully,

ALGERNON S. DRESSER, Register.
GEO. W. BIBEE, Receiver.

Com. No. 7649.

(Endorsed) I hereby acknowledge service of the within notice, a copy of the same having been delivered to me by Special Agent A. J. Hobbs, in Portland, Oregon, on date of April 13th, 1904, at 3 o'clock, p. m.

GEORGE F. MERRILL.

The within notice having been served in person, I hereby return the same to the R. & R., U. S. Land Office, Oregon City, Ore., this April 14th, 1904.

A. J. HOBBS,
Special Agent, G. L. O."

Under what theory this was admissible we are at a loss to conceive. The only effect that it would have would be to show the jury that the Government regarded the claim of Merrill as fraudulent and thereby raise the inference that it was fradulent. **Certainly the fact that some officer of the Land Office had suspended the hearing of this claim could not make his acts or declarations evidence against the defendants.**

Can the Final Proof Papers of a Witness Be Introduced for the Purpose of Showing That the Defendants Procured Him to Make False Proofs, When the Witness Denies Making the Answers Therein Contained and There Is No Other Evidence on the Subject?

The Government called as a witness Addison Longenecker, who testified (see page 927) in substance as follows: Being interrogated about his final proof papers, denied that he answered the questions as they appear upon the proof, which is Government's Exhibit 40. He denies that he answered question 5 in the affirmative. He denied that he answered question 6 to the effect that he had been absent for about five months at the time for the purpose of making a living. He denied that he answered question 7 to the effect that he had cultivated one acre and a half for two seasons. The making of this proof is set out as one of the overt acts in the indictment. It is alleged that the defendants caused, induced and procured Daniel Clark to make certain answers exactly as they are set out in Government's Exhibit No. 40, and certain questions in particular are set out which it is alleged the defendants caused the witness to answer in a certain way. The Government then calls this witness and the witness utterly denies making the answers, and upon that state of the record, the exhibit is offered and admitted in evidence, over the objection of the defendants that it was irrelevant and immaterial and in direct contravention of the allegations of the indictment.

It seems to us that this was certainly error. If the witness had testified that he did make the an-

swers, this, taken together with other evidence in the case, would certainly have made the paper admissible, but since he testifies that he did not make them, it would seem that something more would be necessary to make them admissible. To hold otherwise would be equivalent to holding that the paper was admissible in any event, whether the witness answered the questions or not. If the witness did in fact answer them, the Government could have established that fact by other witnesses, but it made no attempt to do so.

Are the Secret Intentions of an Entryman, Not Communicated to the Defendants, Admissible Against Them for the Purpose of Showing Bad Faith?

Louis Paquet was called as a witness and asked by the Government (page 984), "Did you ever at any time intend to make that your home out there in that little cabin?" The defendants objected that it was incompetent, irrelevant and immaterial, as the intention of the witness would not bind the defendants. The Court overruled the objection and allowed the witness to answer. He answered, "Well, now, I calculated to get what I could out of it and make what I could out of it. I calculated that I had a right to this land and if I could get it and sell it it would be my own."

The Court will remember that this witness filed upon his homestead on the 3rd day of October, 1900, and the indictment alleges that this conspiracy was entered into about two years later.

Under what possible theory could the intention

of the applicant bind the defendants? If the indictment charged that a conspiracy was entered into between the entryman and the defendants by which the entryman was not to live upon the lands in good faith, then this testimony might be admissible, but the defendants are not connected with the entryman. There is no allegation of conspiracy on the part of the entryman and under those circumstances it is difficult to see how the defendants can be made criminals by the secret intention of the entryman. The witness was not asked whether he had communicated that intention to the defendants, and there is no allegation or proof that he had done so. And there is no allegation in the indictment that the entrymen had not filed in good faith.

The Government called one Anthony Gannon as a witness (see page 1000), who testified that he entered into a written contract with the defendant Jones. That he went upon his claim in 1900 and proved up on the same in 1901 at Oregon City, and afterwards sold the land to Mr. Montague. And thereupon the District Attorney asked the witness the following question: "You never at any time intended to make that your home up there, did you?" To which the defendants' counsel objected that it was incompetent, irrelevant and immaterial and because the intention of the entryman was not evidence against the defendants. The Court overruled the objection and allowed an exception and the witness answered, "No, sir, I did not."

It will be observed that the defendants are on trial for a conspiracy entered into on September 3, 1902. This witness had made his final proof in 1901. The indictment charges that the defendants

conspired to defraud the Government of certain lands therein described and not including the land of this witness, by false, illegal and fraudulent proofs of homestead entry and of settlement and improvements upon said land respectively by said entrymen respectively, and by causing and procuring said respective entrymen to make false and fraudulent proofs of settlement and improvements upon said lands respectively. The false proofs contemplated by the conspiracy mentioned in this indictment were yet to be made. How can the falsity of the proof upon a claim already made throw any light upon the transactions mentioned or referred to in the indictment? Furthermore, the indictment does not allege that the proof was false or was to be false with respect to the intent of the homesteader. The Government was to be defrauded by means of false proofs of homestead entry, settlements and improvements. How, then, can the secret intention of the homesteader, which is not shown to be communicated to the defendants in any way, have any bearing upon the guilt of the defendants?

The contract entered into between Mr. Jones and the homesteaders (see page 867) provides as follows: "And the party of the first part (the homesteader) agrees to comply with the laws of the United States in regard to residence upon said lands taken as a homestead."

Can these defendants be convicted because the homesteader did not intend to comply with law, although he had agreed with the defendants that he would do so, and his secret intention had not been communicated to them? In what way or

manner does his intention bear upon the guilt or innocence of the defendants?

Is a Chain Stronger Than Its Weakest Link?

The Government called as a witness one John L. Wells, who testified as to certain conversations had with the defendant Jones about getting soldiers to take up land in the Siletz Reservation, and the United States Attorney claimed that Wells was by virtue of these conversations the agent of the defendants Jones and Potter, and thereafter introduced evidence as to the statements of said Wells and other entrymen upon the theory that said Wells was the agent of the defendants. For instance, on page 919, Addison Longenecker was called as a witness and testified as to conversations he had with Mr. Wells; that Mr. Wells told him about the land down there at Siletz; that he went to Mr. Wells' office and made a contract to go on the land; that Mr. Wells was at his house and told him what time to go. Several other witnesses, not necessary to point out specifically, we think, also gave testimony as to conversations with Wells, some of them testifying that they had never talked with Mr. Jones or Mr. Potter about it at all.

With this in view, the defendants' counsel asked the following instruction (see page 1040):

"There has been admitted on behalf of the Government evidence of certain acts or declarations purporting to have been made and done by John L. Wells, relating to proofs of residence and cultivation on the several claims described in the indictment and in the evidence. You cannot consider the said acts and declarations of Wells against the de-

fendant Jones unless you first find beyond a reasonable doubt that they were authorized by the defendants or one or more of them, or unless you find beyond a reasonable doubt that the said acts and declarations were known to the defendants or to one or more of them."

This was refused and an exception allowed.

We submit that this was error. It is elementary that a jury must be satisfied beyond a reasonable doubt of every fact necessary to a conviction. Now, if they were not so satisfied that Wells was authorized to represent the defendants or that defendants knew of the acts and declarations of Wells, by what right does the jury consider them in determining the guilt or innocence of the defendants?

This is a criminal case, in which it is sought to convict the defendants chiefly upon circumstantial evidence. The Court instructed the jury that direct or positive evidence was not necessary. The Court said (page 1057):

"Positive evidence entirely in proof of the conspiracy is not necessary to be had. From the nature of the case the evidence frequently is in part circumstantial," etc.

We understand the rule to be that in criminal trials, at least, the chain is no stronger than its separate links. If the jury were not satisfied beyond a reasonable doubt that Wells was the agent of the defendants, they ought not to have taken into consideration his acts or declarations in making up their verdict.

In Sumner v. State, 5 Blackford, 579, the instruction asked was as follows:

"Every circumstance material in this case must also be proved beyond a rational doubt or it is the duty of the jury to discard such circumstance in making up their verdict."

The Court held that the instruction ought to have been given, and quoted from 1 Starkey on Evidence, 571, as follows:

"Mr. Starkey says that it appears to be essential to circumstantial proof that the circumstances from which the conclusion is drawn should be fully established. If the basis be unsound, the superstructure cannot be secure. The party upon whom the burden of proof rests is bound to prove every single circumstance which is essential to the conclusion in the same manner and to the same extent as if the whole issue had rested upon the proof of each individual and essential circumstance."

This is the rule in California:

People v. Phipps, 39 Cal. 326.

People v. Smith, 106 Cal. 73.

In Colorado:

Clare v. People, 9 Colo. 122.

Graves v. People, 18 Colo. 170.

In Indiana:

Sumner v. State, above cited.

Raines v. State, 152 Ind. 69.

In Massachusetts:

Com. v. Webster, 5 Cush. 318.

In Michigan:

People v. Aiken, 66 Mich. 460.

People v. Foley, 64 Mich. 148.

People v. Fairchild, 48 Mich. 31.

In Montana:

Ter. v. McAndrews, 3 Mont. 158.

In Oklahoma:

Dossett v. United States, 3 Okla. 593.

In Texas:

Johnson v. State, 18 Tex. App. 385.

In North Carolina:

State v. Meissimer, 75 N. C. 385.

In North Dakota:

State v. Young, 9 N. D. 165.

In Nebraska:

Marion v. State, 16 Neb. 349.

In Washington:

Leonard v. Territory, 2 Wash. Ter. 381.

In Kansas:

State v. Furney, 41 Kan. 115.

In Illinois the rule seems to be the other way:

Bresler v. People, 117 Ill. 422.

In Iowa the rule was formerly the same as in Illinois:

State v. Hayden, 45 Ia. 11.

But it seems now to agree with the rule in other States:

State v. Cohen, 108 Ia. 208.

In order that the Court may see that this was important, we desire to call the Court's attention to the testimony, from which it appears that the greater portion of the evidence of the conspiracy was made up from the acts and declarations of the witness Wells.

On page 956 William Tightmeier was called as a witness and testified that he had known John L. Wells sixteen or seventeen years; talked with Wells about taking up a claim; that Wells told him that he need not go on the land at all; that the answers contained in the written final proof were what Wells told him to say. That Wells told him to answer he had cultivated an acre or more and raised crops on it two seasons. That he was a witness for Wells making his final proof, but he had never seen Wells on the land and only knew what Wells told him. That he was a witness for George Rilea but knew nothing about the facts and got his information from Wells and from West. That Wells told him they would not have to go on the land but once in six months, and that all the work had been done.

On page 982 Louis Pacquet testified that Wells first spoke to him about filing and told him when to go and file.

George J. West, on page 989, testified that he gave his postoffice address as Siletz, because Wells told him to; that Wells told him they were not very particular up there (meaning the Land Office) and it was merely a form they had to go through.

There was no single witness that pretends to say that the defendants ever advised him not to comply

with the law, or that he did not have to reside upon it in good faith, or that he should state anything except the truth, but all of this class of testimony purports to come from Wells. It was important, therefore, to the defendants that the jury should have been properly instructed upon this subject.

Is An Allegation That the Defendants Knew a Thing To Be True a Sufficient Allegation That the Thing Is True?

The Court gave to the jury the following instruction (page 1070):

"So the essential questions which you are called upon to determine are—Does the evidence show, beyond a reasonable doubt, that Jones, Potter and Wade, or two of them, knowingly and intentionally, on or after September 3, 1902, and prior to May 5, 1904, entered into an agreement or combination to defraud the United States out of the possession, use and title to the lands described in the indictment, or some of them and which were open to homestead entry, by means of false, illegal and fraudulent proof of homestead entry and settlement and improvements upon the lands described in the indictment, as filed upon respectively by the entrymen named to make false and fraudulent proofs of settlement and improvements upon the lands described, and thereby to induce the Government to convey by patent the lands filed upon by the respective entrymen, without any valid or sufficient consideration therefor, the defendants well knowing at the time that each of the respective entrymen named in the indictment was not entitled thereto, under the laws of the United States, by reason of

the fact that they and each of them had failed and neglected to actually settle or reside upon the land for any period or periods of time, and to faithfully and honestly endeavor to comply with the requirements of the homestead law, as to settlement and residence upon or cultivation of the land. And does the evidence satisfy you, beyond a reasonable doubt, that these defendants, or any two of them, then and there well knew that each of the said respective entrymen was entering the land filed upon by him for the purpose of speculation, and not in good faith to obtain a home for himself?"

The defendants excepted to that portion of the instruction which follows:

"Does the evidence satisfy you beyond a reasonable doubt that these defendants, or any two of them, then and there well knew that each of the said respective entrymen was entering the land filed upon by him for the purpose of speculation, and not in good faith?"

Stating the ground of the objection to be that the allegation in the indictment that the defendants knew a thing to be true, is not a sufficient allegation that it is true. There is no allegation in the indictment that the entrymen had failed or neglected to settle upon the lands or to reside upon them, but only an allegation that the defendants knew that they had not so settled and resided upon said lands and that the defendants knew that the entrymen had not taken said lands in good faith for the purpose of a home, etc.

Before the defendants could be guilty, the fact must have existed and the defendants known of it. That this allegation is insufficient is settled by the

following authorities, referred to in the discussion of the indictment:

United States v. Peuschel, 116 Fed. 642.
Bartlett v. United States, 106 Fed. 884.
United States v. Smith, 45 Fed. 561.
United States v. Harris, 68 Fed. 347.
United States v. Long, 68 Fed. 348.

The Time at Which It Was Necessary to Prove the Existence of the Conspiracy.

The indictment in this case was found on September 2, 1905. The final proofs were made on September 5, 1902. As the final proofs were the means set out in the indictment and the causing of certain of these final proofs to be made were assigned as the overt acts, the defendants requested the following instruction (page 1048):

"You cannot find the defendants guilty of any conspiracy that was not in existence and operation between the defendants on or after the 2nd day of September, 1902. That is to say, there must be evidence in this case satisfying your minds beyond a reasonable doubt of some concert of action or understanding to defraud the United States between the defendants between the 2nd day of September, 1902, and the 5th day of September, 1902."

The Court refused to give this instruction and the defendants were allowed an exception, but gave instead the following (page 1070):

"So the essential questions which you are called upon to determine are: Does the evidence show beyond a reasonable doubt that Jones, Potter and Wade, or two of them, knowingly and intentionally, on or after September 3, 1902, and prior to May 5,

1904, entered into an agreement or combination to defraud the United States out of the possession, use and title," etc.

The difference is this: The Government claimed and the Court held that if the conspiracy existed at any time between September 3, 1902, and May 5, 1904, the defendants could be convicted, while the defendants contended the time should be limited from September 2, 1902, to September 5, 1902. In order to determine which contention is correct, it will be necessary again to refer to the indictment.

The indictment charges a conspiracy entered into on the 2nd day of September, 1902, and that on the 5th day of September, 1902, "in pursuance of said conspiracy and to effect the object thereof, said defendants did cause, induce, and procure said Daniel Clark to make final proof," and a like charge with reference to the Longenecker proof.

Now, it is well settled that the overt act must be subsequent to the conspiracy.

In United States v. Milner, 36 Fed. 890, Judge Pardee said:

"In neither count is there any averment of time or place of the alleged overt act which would seem to be necessary to identify the act and to show the Court and jury that the same post-dated the conspiracy and was in fact an act under and part of the conspiracy and done to effect its object."

This really needs no argument, because the act could not be in furtherance of the conspiracy unless the conspiracy previously existed. Now, the defendants are charged with a combination to defraud the United States by means of certain false

proofs. These proofs were made, as appears from the indictment and the proofs, on the 5th day of September, 1902. The causing of these proofs to be made is set out in the indictment as overt acts. Therefore the indictment must necessarily refer to a conspiracy which existed previous to that time. But under the instruction of the Court, the jury were authorized to find the defendants guilty if there never was any conspiracy until the 4th of May, 1904. Under that instruction, if the jury were of the opinion that the defendants had never entered into a conspiracy until May 4, 1904, and they had then entered into it and the Fulton letter was written on the 5th, that they might be convicted, a result which is so plainly and so clearly and so utterly opposed to the whole theory of the indictment and the trial as to warrant the reversal of the case.

If it be said that the jury were authorized to find that there was a conspiracy prior to September 5, 1902, and another one subsequent to that and prior to May 5, 1904, then we ask of which one were the defendants convicted? If they shall again be indicted for a conspiracy to defraud the Government out of this land formed, say on May 1, 1904, can they plead this conviction as a bar? The question cannot be logically answered if the theory of the prosecution is correct.

Ought the Court to Instruct the Jury that They Are Not To Be Influenced by the Fact that the Defendants Have Been Indicted?

The defendants requested the Court to give the jury the following instruction (see page 1042):

"Under the laws of criminal procedure of the United States, persons charged with crime are generally put upon their trials through indictments duly found and presented by the Grand Jury. An indictment is a formal accusation made by the Grand Jury charging a person with the commission of a public offence, but you are all of you doubtless wholly familiar with the rule of law that a defendant is not to be prejudiced by the mere fact that when the question of his guilt or innocence is tried, a trial jury must not be influenced by the fact that he has been indicted."

The Court refused to give this instruction and defendants duly excepted to the refusal.

The Court did not cover this by any other instruction, in fact did not refer to the subject at all. It seems to us that this was clearly error. It needs no citation of authority to convince this Court that a jury ought not to be influenced by the fact of the indictment.

Mr. Wigmore on Evidence, Sec. 2511, Vol. 4, discussing the presumption of innocence and showing that ordinarily it is a part of the rule as to burden of proof, adds:

"But in a criminal case the term itself conveys a special and perhaps useful hint over and above the other term of the rule about the burden of proof, in that it cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment and the arraignment, and to reach their conclusions solely from the legal evidence adduced. In other words, the rule about burden of proof requires the prosecution by evi-

dence to convince the jury of the accused's guilt, while the presumption of innocence too requires this, but conveys to the jury a special and additional caution (which is perhaps only an implied corollary to the other) to consider in the material for their belief nothing but the evidence, i. e., no surmises based on the present situation of the accused, a caution particularly needed in criminal cases."

The Anarchists' Case has been almost a standard for the trial of conspiracy cases since its close, and is quoted and referred to by nearly all authorities on the question. The eighth instruction given for the defendants in that case was as follows:

"The jury are further instructed that the indictment in this case is of itself a mere accusation or charge against the defendants and is not of itself any evidence of the defendants' guilt and no juror in this case should permit himself to be to any extent influenced against the defendants because of or on account of the indictment in this case."

Sackett's Instruction to Juries, page 719.

This is the only case in which we ever heard the instruction refused. Most Courts give it without any request.

Respectfully submitted,

S. B. HUSTON and
MARTIN L. PIPES,
Attorneys for Appellants.